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September 2004

# Grutter's First Amendment

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## **Public Law and Legal Theory Research Paper Series**

**September 2004**

**Grutter's First Amendment**

**Paul Horwitz**

# *Grutter's First Amendment*

*Paul Horwitz*<sup>\*</sup>

## TABLE OF CONTENTS

I.	INTRODUCTION
II.	PROFESSIONAL AND CONSTITUTIONAL ACADEMIC FREEDOM
A.	The Roots of Professional Academic Freedom
B.	The Roots of Constitutional Academic Freedom
1.	The Pre- <i>Bakke</i> Cases: The Birth Pangs of Constitutional Academic Freedom
2.	<i>Bakke</i> : "... Who May Be Admitted to Study"
3.	<i>Grutter</i> : Revisiting Constitutional Academic Freedom
III.	TAKING <i>GRUTTER</i> SERIOUSLY
A.	Institutional Autonomy and its Implications
1.	Hate Speech On Campus
2.	Content Distinctions On Campus, With Special Attention to Religious Speech
3.	The Solomon Amendment
4.	The Academic Bill of Rights
5.	Racially Based Scholarships
6.	Single-Sex Schools, Historically Black Colleges, and Other Exclusive Educational Institutions
7.	Conclusion
B.	<i>Grutter's</i> First Amendment As Substantive Commitment
C.	Is <i>Grutter's</i> First Amendment Consistent With the Court's First Amendment Jurisprudence?
IV.	TAKING FIRST AMENDMENT INSTITUTIONS SERIOUSLY
A.	Introduction
B.	<i>Grutter</i> and First Amendment Institutions
C.	Democratic Experimentalism, Reflexive Law, and <i>Grutter's</i> First Amendment
D.	Questions and Implications, With A Digression on State Action
V.	CONCLUSION

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## I. INTRODUCTION

No shortage of ink will be spilled on the Supreme Court's recent affirmative action decisions.<sup>1</sup> And little imagination is needed to predict how much of that commentary will run – as praise for the Court's cautious, Solomonic, sound balancing of the conflicting concerns of formal equality and racial justice in light of the continuing consequences of slavery, or as condemnation of an unprincipled, unsound departure from fundamental principles of equal justice under law.<sup>2</sup> In any event, the *subject* of the symposia, colloquia, special issues, and other countless discussions devoted to these cases will be clear: *Grutter* and *Gratz* belong to the Fourteenth Amendment caselaw, sub-*genus* affirmative action.

I propose to leave that debate to one side. Notwithstanding the expertise and the good intentions of many of those constitutional scholars who will enter the lists on one side or another of the affirmative action debate, I suspect that a good deal of discussion of *Grutter* and *Gratz* will simply rehearse positions long since fixed on this divisive issue. Perhaps it is in the nature of the subject. As a matter of policy and morality, affirmative action is too controversial to lend itself to a principled resolution that can easily command popular consensus. As a matter of constitutional law, the capacious terms of the Constitution, the meandering course of the Court's opinions, and the opaque nature of the Court's discussions will invariably lead the legal debate back to the intractable moral and political questions.<sup>3</sup> Discussion about affirmative action may simply be one more

<sup>1</sup> *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

<sup>2</sup> See, e.g., Deborah Jones Merritt, Barbara Reskin, and Bill Lann Lee, *Growing Beyond Grutter*, *Jurist*, available at <http://jurist.law.pitt.edu/forum/symposium-aa/merritt.html> (Sept. 9, 2003) ("Some praised *Grutter* and its companion case, *Gratz v. Bollinger*, as a lawyerlike compromise. Others scorned the opinions as a patchwork that confused admissions officers and the public."); Walter Dellinger and Dahlia Lithwick, *The Breakfast Table*, *Slate*, June 25, 2003 (remarks of Walter Dellinger praising *Grutter* and *Gratz* precisely for their Solomonic wisdom and arguing, "When it comes to an issue like this, . . . Supreme Court adjudication isn't the same as excelling at Logical Puzzles 101. . . . On an issue like this, the most logical answers aren't necessarily the right ones."); Joel L. Selig, *The Michigan Affirmative Action Cases: Justice O'Connor, Bakke Redux, and the Mice That Roared But Did Not Prevail*, 76 Temple L. Rev. 579, 579 (2003). See also Goodwin Liu, Brown, Bollinger, and Beyond, 47 How. L.J. 705, 705 (2004) (noting that "civil rights advocates across the country proclaimed victory" following the issuance of *Grutter*); Joel K. Goldstein, *Beyond Bakke: Grutter—Gratz and the Promise of Brown*, 48 St. Louis U. L.J. 899, 901 (2004) (calling the decisions "a triumph for those advocating racial preferences in admissions decisions"); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. Pa. L. Rev. 347, 381-82 & nn.163-66 (2003) (collecting positive public reactions to *Grutter*). For remarks that are broadly critical of *Grutter*, see Larry A. Alexander and Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, \_\_ Const. Comm. \_\_ (2004).

<sup>3</sup> For broadly similar conclusions from differing points along the political spectrum, see Richard A. Posner, *The Problematics of Moral and Legal Theory* 139-40 (1999); Cass. R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, ch. 6 (1999).

illustration of a basic principle of legal discourse: the political heat of an issue is inversely proportional to the light that legal debate can shed on it.

This article, then, is *not* a brief for or against affirmative action, in higher education or elsewhere. It is not, at least on express terms, a Fourteenth Amendment article at all. The question raised by this article is a quite different one.

To uncover that question, it may help to recall that *Grutter* addressed the constitutionality of affirmative action not once and for all, but in a limited context. It asked only whether there is a “compelling state interest in student body diversity” in “the context of higher education.”<sup>4</sup> The answer to that *Fourteenth* Amendment question – whether the University of Michigan Law School’s race-conscious admissions policy withstood the strict scrutiny required by the Court’s Equal Protection jurisprudence – depended in turn on certain important assertions about the *First* Amendment. Briefly restated, the Court’s reasoning ran as follows:

- Universities “occupy a special niche in [the] constitutional tradition” of the First Amendment.<sup>5</sup>
- That special role accords to universities a substantial right of “educational autonomy,” within which public higher educational institutions are insulated from legal intrusion.<sup>6</sup> Within that autonomous realm, universities are entitled to deference when making academic decisions related to their educational mission.<sup>7</sup>
- Educational autonomy includes “[t]he freedom of a university to make its own judgments as to . . . the selection of its student body.”<sup>8</sup>
- More specifically, a public university has a compelling interest in selecting its student body in order to ensure a “robust exchange of ideas,”<sup>9</sup> of which one means is the selection of a “diverse student body.”<sup>10</sup>
- The Court’s scrutiny of the law school’s admissions program, although ostensibly strict in nature, must take into account this compelling First Amendment-based interest.<sup>11</sup>

<sup>4</sup> *Grutter*, 123 S. Ct. at 2338.

<sup>5</sup> *Id.* at 2339.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.)).

<sup>9</sup> *Id.* (quoting *Bakke*, 438 U.S. at 313 (quoting in turn *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967))).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

- *Ergo*, the Court ultimately held, the law school's race-conscious admissions policy withstands Fourteenth Amendment strict scrutiny, given the compelling state interest of "student body diversity"<sup>12</sup> and the level of deference accorded the university in tailoring its admission policies.

Much debate over the University of Michigan decisions will doubtless pass lightly over these assertions, or focus on them primarily for their role in the larger *Fourteenth* Amendment discussion. But the implications of this decision – that "attaining a diverse student body is at the heart of [a university's] proper institutional mission," and that there is a strong First Amendment in "educational autonomy"<sup>13</sup> – ought to be of equal interest to First Amendment scholars.

If history is any guide, however, *Grutter* is unlikely to attract much sustained attention as a First Amendment case. Consider the fate of *Regents of the University of California v. Bakke*.<sup>14</sup> Although *Bakke* has entered the legal canon and gained public notoriety for its central role in the affirmative action debate, Justice Powell's pivotal opinion in that case is also grounded in the First Amendment, as the *Grutter* Court recognized.<sup>15</sup> As one of the leading students of the relationship between American constitutional law and academic freedom has observed, *Bakke* represented a significant shift in the constitutional law of academic freedom: a shift from a concept of academic freedom as an individual right to "a concept of constitutional academic freedom as a qualified right of the *institution* to be free from government interference in its core administrative activities, such as deciding who may teach and who may learn."<sup>16</sup>

Yet *Bakke* receives virtually *no* mention in any of the leading First Amendment treatises and casebooks.<sup>17</sup> Indeed, most of these prominent texts essentially sweep aside the entire subject of academic freedom, on which both *Bakke* and *Grutter* are grounded. Nor have the law reviews done much to fill the gap. While there is obviously an extraordinary amount of legal scholarship

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<sup>12</sup> *Id.* at 2337.

<sup>13</sup> *Id.* at 2339.

<sup>14</sup> 438 U.S. 265 (1978).

<sup>15</sup> See *Grutter*, 123 S. Ct. at 2339 (noting that Justice Powell's opinion in *Bakke* "invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy.").

<sup>16</sup> J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 257 (1989).

<sup>17</sup> In fact, I could find only one mention of *Bakke* in any of the many casebooks and treatises devoted solely to First Amendment law that I surveyed. See Rodney Smolla, 2 *Smolla and Nimmer on Freedom of Speech* §§ 12:21, 13:20, 17:37 (1996). Indeed, while some casebooks and treatises pay attention to issues concerning free speech in the public school context, few devote any space at all to First Amendment issues dealing with academic freedom in higher education.

dealing with *Bakke* as a Fourteenth Amendment case, and a significant but somewhat isolated volume of legal scholarship dealing with academic freedom on its own terms, very few scholars have dug deeply into the question of the relationship between *Bakke* – and now, *Grutter* – and the First Amendment.<sup>18</sup> And those few treatments have generally not pressed the question whether the First Amendment principles announced in *Bakke*, and reaffirmed in *Grutter*, have (or should have) any application beyond the narrow context of race-conscious admissions policies in public higher education. That general reluctance to make a home for *Bakke* and its newest progeny in First Amendment scholarship, let alone to deal seriously with its implications, is unfortunate.

This article aims to fill that gap. It proposes to take *Grutter* seriously as a *First Amendment* case. It asks: What does *Grutter*'s First Amendment mean? What are the implications of its approach?

The answers to that question are surprisingly wide-ranging. If one reads *Grutter* for all it is worth as a First Amendment opinion, one may reap a wide harvest of possible implications on a variety of subjects, some closely related to the First Amendment and others farther afield in constitutional law:

- Notwithstanding the contrary caselaw, *Grutter* suggests that universities may be entitled to greater latitude in formulating speech codes to address racist, sexist, or other harassing speech on campus.
- *Grutter* offers new avenues for universities that wish, on academic grounds, to curtail at least some forms of religious speech on campus.
- As some litigants have already recognized, *Grutter* may help fuel arguments against the Solomon Amendment, which forbids law schools that receive public funding from barring on-campus interviews by the military. But a serious reading of *Grutter* also suggests that most of the plaintiffs in these cases lack standing to pursue their claims against the application of the Solomon Amendment. Thus, a recent district court decision addressing these issues was arguably wrong in its conclusions on both the justiciability issues and the merits.

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<sup>18</sup> For some attempts to address these issues, see Darlene C. Goring, *Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body is a Permissible Exercise of Institutional Autonomy*, 47 U. Kan. L. Rev. 591 (1999); Alfred B. Gordon, *When the Classroom Speaks: A Public University's First Amendment Right to a Race-Conscious Classroom Policy*, 6 Wash. & Lee Race & Ethnic Anc. L.J. 57 (2000). See also Jim Chen, *Diversity and Damnation*, 43 UCLA L. Rev. 1839 (1996) (criticizing affirmative action in higher education admissions as a species of content-based speech regulation).

*Grutter's First Amendment*

- *Grutter* may support universities' *opposition* to legislation that would purport to enshrine the principles of academic freedom in the law.
- Despite the leading case on the subject, *Grutter* suggests that universities may be able to justify the maintenance of racially based scholarship programs.
- *Grutter* invites universities (or other higher educational institutions, such as military academies) to revisit the issue of publicly supported single-sex schools. It may also provide a basis for arguments in favor of the maintenance of racially exclusive institutions of higher education, without specific regard to the race involved.

In looking at this list of possible extensions of *Grutter*, a few things should be clear. First, each of these prospects should prove attractive to at least some First Amendment and/or constitutional law scholars. Second, it is unlikely that any individual scholar will find *all* of them attractive. Third, some who support *one* of the potential outcomes listed above will find others on the list utterly repugnant to their understanding of the First Amendment or other constitutional values. Yet, on one reading,<sup>19</sup> *all* of these applications of *Grutter's* First Amendment are equally compelled by the logic of the decision.<sup>20</sup>

Finally, the broader implications of the case and its reasoning should persuade First Amendment scholars that they need to make a proper home in their work for *Bakke* and *Grutter*. Whatever explains the failure in First Amendment scholarship to fully examine the implications of *Bakke's* institutional autonomy theory of academic freedom, and now its sequel in *Grutter*, the omission should be remedied.

That is particularly true because, on another reading of *Grutter*,<sup>21</sup> the case raises interesting questions of consistency between the approach taken to the First Amendment in that case and the approach taken elsewhere in First Amendment doctrine. That is certainly so for the Justices who signed onto *Grutter*: While an argument could be made that *Grutter's* view of the First Amendment is consistent with the approach taken elsewhere by some of the majority, one or more of the Justices in the majority clearly adopt a different approach in most of their First Amendment jurisprudence.<sup>22</sup> Conversely, a number of the Justices who dissented in *Grutter* have been described elsewhere as taking a strong view of the

<sup>19</sup> See Part III.A, *infra*.

<sup>20</sup> I stress the importance of the word "logic" here. I do not mean to suggest that all of these implications *will* follow from *Grutter* – only that they *could* follow from *Grutter*, if its First Amendment discussion is taken seriously. See Part III.B.5, *infra*.

<sup>21</sup> See Part III.B, *infra*.

<sup>22</sup> See Part III.C, *infra*.



importance of intermediary institutions in the law<sup>23</sup> – a position that is arguably consistent with the majority in *Grutter* and inconsistent with the dissenters' position in that case.

Why have both the Court and the community of First Amendment scholars failed to fully confront the implications of *Grutter* as a First Amendment case? To be sure, *Grutter* is a recent case, and reactions to it are still in the formative stage. But it cannot be merely a function of *this* case's novelty. *Grutter*'s First Amendment is, with significant changes, a restatement of Justice Powell's opinion in *Bakke*, and that case is now a quarter of a century old. Nor is *Grutter* the first time the Court has confronted the First Amendment implications of *Bakke*: the Supreme Court acknowledged the implications of *Bakke*'s First Amendment discussion, and its tensions with other aspects of First Amendment doctrine, more than a dozen years ago.<sup>24</sup>

What, then, can we say about the inability or unwillingness of the Court and its observers to fully confront the First Amendment implications of *Bakke* – and, I venture to assume, *Grutter*? What are its causes, and what are its consequences? I suggest that three important conclusions follow from the status of these cases as neglected, if not unwanted, stepchildren of the First Amendment.

First, perhaps the most sensible conclusion one can draw is that the Supreme Court *never* meant anyone to take *Bakke* seriously as a First Amendment case,<sup>25</sup> and will similarly ignore the First Amendment implications of *Grutter* in future cases. Perhaps *Bakke* and *Grutter*, in their First Amendment dimensions at least, are the proverbial tickets good for one trip only.<sup>26</sup> Thus, the relative lack of attention to *Bakke*'s First Amendment implications, and what I venture to predict will be a similar silence with respect to *Grutter*'s meaning as a First Amendment case, may be simply a tacit acknowledgement that the First Amendment elements of these cases are mere makeweights, best left forgotten lest they complicate matters if imported into other areas of First Amendment doctrine.

If that were the only conclusion that could be drawn from the relative neglect of the First Amendment consequences of *Bakke* and *Grutter*, it would still

<sup>23</sup> See, e.g., John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485 (2002).

<sup>24</sup> See *Univ. of Pennsylvania v. EEOC*, 493 U.S. 182 (1990).

<sup>25</sup> Cf. Byrne, *supra* note \_\_, at 315 ("An early reader of *Bakke* could be pardoned if she doubted that the Court was serious about a First Amendment right of institutional academic freedom. Was it not merely a chimera of a doctrine, affirmed only for that day, to provide an acceptable ground on which Justice Powell could preserve affirmative action while condemning racial preferences?"). Byrne suggests that the principle has had at least some vitality beyond *Bakke*. See *id.* at 316.

<sup>26</sup> See, e.g., Mark G. Yudof, *The Three Faces of Academic Freedom*, 32 Loy. L. Rev. 831, 855-56 (1987) (suggesting just that about *Bakke*).

deserve public comment. Recent history suggests that many constitutional scholars don't much care for restricted-ticket cases.<sup>27</sup> Less trivially, however, it is surely worth pointing out that while the Court and constitutional scholars alike have treated *Bakke* seriously (and will do the same for *Grutter*) as a case about affirmative action, far less careful attention has been paid (and likely will be paid, in *Grutter*'s case) to the First Amendment implications of those cases.

But there is more to it than simply pointing fingers. *Grutter* and *Bakke* are paid scant attention as First Amendment cases because of the dismal area in which they arise. *Grutter*'s First Amendment is the domain of constitutional academic freedom, and the federal courts have never adequately addressed the many questions that have arisen every time they venture into this field. As this article suggests, both the Supreme Court and the lower courts have never adequately confronted the scope and meaning of constitutional academic freedom – or, rather, the Court has alternated between extraordinarily sweeping statements and narrow, evasive statements about the First Amendment bounds of academic freedom. Nor have legal scholars, despite many fine efforts, been able to provide the order and coherence to this area that the Court has not.<sup>28</sup>

If the Court in *Grutter* seemed little conscious of the potential implications of its First Amendment discussion, that is simply par for the course in the Court's treatment of constitutional academic freedom. As this article explains, *Grutter*, like *Bakke* before it, is a significant extension of the original notion of constitutional academic freedom. On one reading of the case,<sup>29</sup> it is grounded on a contestable view of academic freedom – one that sees academic freedom as serving larger *democratic* values, rather than narrower truth-seeking values. But that grounding is less secure than it seems, for the Court has offered no clear explanation of what constitutional academic freedom is or ought to be. At the same time, it would be difficult for it to do so, for whatever meaning *constitutional* academic freedom may have, it is clear that the *professional* conception of academic freedom on which the Court has drawn is constantly changing and contested.

That the Court cited and deferred to a particular, democratically oriented conception of academic freedom in *Grutter* is interesting for another reason: It presents interesting conflicts with the Court's broader rejection of a specifically democratic or republican conception of free speech in favor of a system of general

<sup>27</sup> See *Bush v. Gore*, 531 U.S. 98 (2000), and the already voluminous scholarship criticizing the Court's opinion in this case on precisely this ground.

<sup>28</sup> See Byrne, *supra* note \_\_, at 320 ("One reason that institutional academic freedom remains little more than a potential constitutional right is that it has not been explained satisfactorily by legal scholars.").

<sup>29</sup> See Part III.B, *infra*.

rules – or, alternatively, it suggests that the Court paid little attention to the significance of its own First Amendment language in *Grutter*.

The First Amendment discussion in *Grutter* and its parent case, *Bakke*, is interesting for a third and more novel reason, one that ultimately forms the most important contribution of this article. *Grutter*, with all its expansive deference to educational institutions, is that rare case in the Supreme Court's recent First Amendment jurisprudence – a case that takes institutions seriously in the First Amendment.<sup>30</sup>

For the most part, the Court's First Amendment jurisprudence in recent decades has proceeded along very different lines. The Court's refusal to confer rights on the press that differ from those enjoyed by other speakers, notwithstanding the separate presence of the Press Clause in the First Amendment,<sup>31</sup> its ever-increasing focus on content-neutrality as the linchpin of free speech analysis, including much speech by religious individuals and institutions,<sup>32</sup> its refusal to single out religious conduct for special accommodation against generally applicable rules<sup>33</sup> – all of these developments speak to the same trend. The Court has repeatedly sought to use *general* principles, such as neutrality and equality, as its guiding principles in First Amendment jurisprudence.

While that approach may have much to recommend it, it also serves to blind the Court to the real-world context in which many speech acts take place. In particular, it blinds the Court to the importance of the *institutions* in which so much First Amendment activity – worship, study, debate, reporting – occur. The Court's failure to observe “the increasingly obvious phenomenon of institutional differentiation” may hamper its ability to fully appreciate the extent to which different institutions might require different responses when First Amendment issues arise.<sup>34</sup>

*Grutter's* First Amendment approach thus stands out as a rare, though not unprecedented,<sup>35</sup> exception to the Court's generally institution-indifferent approach. By recognizing the special status of universities in our society and attempting to carve out special rules applying to them alone, the Court has departed sharply from its usual practice.

<sup>30</sup> For excellent discussion of this issue, see Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84 (1998).

<sup>31</sup> See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 991-92 (1972); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 798-802 (1978).

<sup>32</sup> See, e.g., Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. Cal. L. Rev. 49, 50 (2000).

<sup>33</sup> See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>34</sup> See Schauer, *supra* note \_\_, at 87.

<sup>35</sup> See *infra* notes \_\_-\_\_ and accompanying text.

For that reason, *Grutter's* First Amendment demands careful attention. I will argue that this institution-sensitive approach can be rationalized and ordered according to a number of basic principles that should guide the Court should it continue to move in this direction. Moreover, this approach is not limited to universities alone, but applies equally to a variety of other First Amendment institutions who play a crucial role in the formation of public discourse. At the same time, this reading raises a number of important questions about the potential pitfalls of an institution-sensitive approach to the First Amendment to educational institutional autonomy – pitfalls that in some ways are exemplified by *Grutter* itself. Although I believe this institution-sensitive reading of *Grutter* has much to recommend it as a shift in First Amendment doctrine, and strongly argue for that approach here, the questions it presents deserve attention too.

Part II of this paper provides some necessary background. It discusses the development of the concept of academic freedom *outside* the courts, and notes some of the contending justifications for what I call professional academic freedom. The second half of Part II discusses the development of the *constitutional* law of academic freedom, tracing its development through the early cases to *Bakke* and *Grutter*. Part III fleshes out the possible implications of *Grutter*. It begins by imagining some of the possible impact on various issues if, as one reading of *Grutter* suggests, the Court has concluded that universities must be given substantial deference in taking steps in service of *any* proper academic goal. It then discusses the ramifications of a second possible reading of *Grutter* – one in which the Court does not simply defer to the academic judgment of the University of Michigan Law School, but positively endorses a specific, democratically oriented conception of academic freedom. Finally, Part IV discusses the First Amendment implications of *Grutter's* willingness to take universities seriously, and accord them special status, as First Amendment *institutions*.

## II. PROFESSIONAL AND CONSTITUTIONAL ACADEMIC FREEDOM

### A. The Roots of Professional Academic Freedom

Any proper discussion of the nature and scope of academic freedom as a *constitutional* value must begin far beyond the Constitution itself. Although the Supreme Court has largely developed the notion of academic freedom as a constitutional value over the past fifty years,<sup>36</sup> it was not writing on a blank page. Academic freedom in the United States is the product of almost 150 years of discussion and development within the academy itself. To understand the growth of *constitutional* academic freedom, then, we must begin with an understanding of the *professional* understanding of academic freedom.

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<sup>36</sup> See *infra* Part II.B.

This section therefore offers a brief history of the development of academic freedom outside the courts. It is a decidedly truncated version of a complicated story.<sup>37</sup> Even a brief recitation of this history, however, suggests three significant conclusions. First, academic freedom, even in its professional setting, comprises a set of shifting, contested norms and values. Second, and relatedly, efforts by courts to define any single set of values as fundamental to academic freedom are thus likely to be unavailing. To the extent the Supreme Court has attempted to construct a stable definition of constitutional academic freedom on the foundation provided by the understanding of professional academic freedom, it has built on unsteady ground. It should be unsurprising, then, that even the concept of constitutional academic freedom discussed below has quietly morphed from one form to another, depending on the underlying justification selected by the Court.

Finally, this section should make clear the dangers of a single-minded focus on the *judicial* conception of academic freedom. Writing in the customary judicial language of rights talk, the courts have neglected the responsibilities that accompany academic freedom. In fact, academic freedom typically is accompanied by a set of professional norms and rules that may constrain academics' speech *more* than other individuals' speech. Although this final point is not of immediate concern, it may ultimately play an important role in framing an institutionally based vision of the constitutional role of academic freedom.<sup>38</sup>

The development of the professional conception of academic freedom in the United States begins in the period following the Civil War. Prior to that time, academic freedom would have been a difficult concept to grasp.<sup>39</sup> Colleges were far smaller institutions, with far more modest goals. Learning consisted of rote instruction within a limited curriculum.<sup>40</sup> Instructors were expected to hew close to those subjects, and performed little if any research and independent

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<sup>37</sup> For more detailed treatments, see, e.g., Richard Hofstadter and Walter P. Metzger, *The Development of Academic Freedom in the United States* (1955); Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817 (1983); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265 (1988) [hereinafter Metzger, *Profession and Constitution*]; David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 Tex. L. Rev. 1405 (1988); *The Concept of Academic Freedom* (Edmund L. Pincoffs, ed. 1972); Byrne, *supra* note \_\_; Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom*, in *Freedom and Tenure in the Academy* 3 (William W. Van Alstyne, ed. 1993) [hereinafter Metzger, *1940 Statement*]; David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, in *id.* at 227 [hereinafter Rabban, *Functional Analysis*].

<sup>38</sup> See *infra* Part IV.

<sup>39</sup> See, e.g., Byrne, *supra* note \_\_, at 269.

<sup>40</sup> See, e.g., *id.* at 269; Finkin, *supra* note \_\_, at 822.

scholarship.<sup>41</sup> Students themselves were assumed to be “wayward[ ] and immatur[e],”<sup>42</sup> and in need of the close supervision of their instructors, which further curtailed their research time and constrained them in the role of guardians and drillmasters.<sup>43</sup> Finally, the colleges were under the close control of lay governing bodies.<sup>44</sup> Taken together, these institutional factors left little room for the development of the sort of robust scholarship and public activity that might compel the establishment of a set of principles of academic freedom.<sup>45</sup>

For a variety of reasons, circumstances changed in the post-Civil War period.<sup>46</sup> One significant factor that contributed to the growth of an American conception of professional academic freedom was the influence of the German universities, which recognized a strong, if delimited, set of principles governing academic freedom. That influence was “transplanted onto American soil” by American students and academics who studied in Germany in significant numbers in the mid-nineteenth century.<sup>47</sup>

For German universities of the era, academic freedom consisted of three central principles. *Lehrfreiheit*, roughly translated as “teaching freedom,” distinguished academics, who were civil servants, from other government employees. Under this principle, professors could pursue their teaching and scholarship “without seeking prior ministerial or ecclesiastical approval or fearing state or church reproof.”<sup>48</sup> Significantly, it was a “distinctive prerogative of the academic profession” in Germany, and not a subpart of the civil liberties generally enjoyed by German citizens.<sup>49</sup>

*Lernfreiheit*, roughly translated as “learning freedom,” amounted to an acknowledgement that German university students were to be treated as “mature and self-reliant beings, not as neophytes, tenants, or wards.”<sup>50</sup> Thus, students were free of the supervisory rules that governed American college students of the same period. German students were free to choose their own courses, largely free

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<sup>41</sup> See Byrne, *id.* at 269; Hofstadter and Metzger, *supra* note \_\_, at 279; Metzger, *Profession and Constitution*, *supra* note \_\_, at 1268 (noting that American college professors in this era had been “pedagogues pure and simple”).

<sup>42</sup> Hofstadter and Metzger, *id.* at 279.

<sup>43</sup> See *id.* at 280-81.

<sup>44</sup> See Finkin, *supra* note \_\_, at 822.

<sup>45</sup> See, e.g., Byrne, *supra* note \_\_, at 268-69; Hofstadter and Metzger, *supra* note \_\_, at 279.

<sup>46</sup> For more extended discussion, see, e.g., Byrne, *supra* note \_\_, at 269-73; Hofstadter and Metzger, *id.*

<sup>47</sup> Metzger, *Profession and Constitution*, *supra* note \_\_, at 1269; see also Hofstadter and Metzger, *id.*, Ch. 8; Finkin, *supra* note \_\_, at 822-29.

<sup>48</sup> Metzger, *id.* at 1269; see also Hofstadter and Metzger, *id.* at 386-87.

<sup>49</sup> Hofstadter and Metzger, *id.* at 387.

<sup>50</sup> Metzger, *Profession and Constitution*, *supra* note \_\_, at 1270.

of attendance or examination requirements, free to live in lodgings of their own choosing and to govern their own lives.<sup>51</sup>

Finally, German universities enjoyed the right of *Freiheit der Wissenschaft*: the right of academic self-governance. Notwithstanding the status of the German university as a state-funded institution, with substantial state control over appointments, universities were entitled to make their own decisions on internal matters, under the direction of the senior faculty.<sup>52</sup> The concept of academic self-governance that undergirds *Freiheit der Wissenschaft* is surely recognizable as a forerunner of the emphasis on institutional autonomy that developed in the courts' discussions of academic freedom and culminated in *Grutter*.

Although the American conception of academic freedom had its roots in the German university system of the nineteenth century, it was not until early in the 20th century that it had its proper birth, with the establishment of the American Association of University Professors (AAUP) and the drafting of its 1915 Declaration of Principles.<sup>53</sup> Some aspects of the Declaration are of particular relevance here. First, as Metzger notes, the drafters of the Declaration "evolved a functional rather than idealistic rationale for freedom of teaching and research."<sup>54</sup> That function revolved around the search for truth.<sup>55</sup> The primary purpose of the university was to "promote inquiry and advance the sum of human knowledge."<sup>56</sup> Modern academic scholarship had an "essentially scientific character"<sup>57</sup> that could best thrive if researchers were afforded "complete and unlimited freedom to pursue inquiry and publish [their] results."<sup>58</sup>

To be sure, the Declaration recognized that teaching was also a significant function of the university, and that academic freedom could be justified on the grounds that professors needed the latitude to speak with "candor and courage" if they were to serve as adequate role models.<sup>59</sup> But this value was decidedly secondary. First and foremost, the Declaration advanced the view that "free employment of the scientific method would lead to the discovery of truths that

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<sup>51</sup> See, e.g., *id.*

<sup>52</sup> See *id.*; Finkin, *supra* note \_\_, at 823.

<sup>53</sup> For this history, see, e.g., Hofstadter and Metzger, *supra* note \_\_, ch. 10; Metzger, *Profession and Constitution*, *supra* note \_\_, at 1267-85; Byrne, *supra* note \_\_, at 276-79.

<sup>54</sup> Metzger, *Profession and Constitution*, *supra* note \_\_, at 1274.

<sup>55</sup> See Byrne, *supra* note \_\_, at 279 ("[T]he American tradition of academic freedom emerged from the professional organization of scholars dedicated to the search for truth").

<sup>56</sup> American Association of University Professors, *General Report of the Committee on Academic Freedom and Academic Tenure* (1915), reprinted in Van Alstyne, ed., at 393, 397 [hereinafter *1915 Declaration*]

<sup>57</sup> Byrne, *supra* note \_\_, at 277.

<sup>58</sup> *1915 Declaration*, *supra* note \_\_, at 398.

<sup>59</sup> *Id.*

exist autonomously in the world.”<sup>60</sup> To the extent the university served a broader democratic function, it was not to serve as a mirror of society, or a breeding ground of future leaders, but as a think tank: universities would serve as a source of experts who could help legislators resolve “the inherent complexities of economic, social, and political life.”<sup>61</sup> Here, too, academic freedom was needed, if legislators were to trust in the “disinterestedness” of the academic expert’s research and conclusions.<sup>62</sup>

Thus, the first important conclusion one can draw from the 1915 Declaration is that academic freedom in America, at least as understood in its early stages, was fundamentally a truth-seeking device. No broader social or democratic values were served by it, except to the extent that society benefited from a corps of disinterested experts.

Second, it is worth noting that the 1915 Declaration concerned itself only with academic freedom for *academics*. *Lehrfreiheit* was the concern here, not *Lernfreiheit*.<sup>63</sup> Thus, although the AAUP often addressed issues of student speech, its founding principles dealt only with research and speech by professors themselves.<sup>64</sup>

Nor did the Declaration deal in express terms with institutional autonomy, or *Freiheit der Wissenschaft*. As Metzger writes, the reason for this shift from the German model of academic freedom “went to the heart of the difference between the German academic freedom and their own.”<sup>65</sup> Whereas German universities were state institutions, which required some model of autonomy to protect them against their masters outside the university gates, American universities were governed by lay bodies. It was those very governing bodies, composed of potentially intrusive non-experts,<sup>66</sup> that posed the greatest perceived threat to free inquiry, not the state. Since the AAUP was unwilling to advocate the elimination of lay governing bodies,<sup>67</sup> it adopted another approach altogether: crafting a set of principles designed to shelter academics from external *or* internal interference, from restrictions by the state or restrictions by governing bodies. In short, the Declaration “exalt[ed] the *neutral* university at the expense of the *autonomous* university.”<sup>68</sup>

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<sup>60</sup> Byrne, *supra* note \_\_, at 277.

<sup>61</sup> 1915 Declaration, *supra* note \_\_, at 398.

<sup>62</sup> *Id.* at 399; see also Derek Bok, *Beyond the Ivory Tower: Social Responsibilities of the Modern University* 5 (1982).

<sup>63</sup> See *id.* at 393 (“It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher[,] [not the student]”).

<sup>64</sup> See Metzger, *Profession and Constitution*, *supra* note \_\_, at 1271-72.

<sup>65</sup> *Id.* at 1276.

<sup>66</sup> See Byrne, *supra* note \_\_, at 275-76.

<sup>67</sup> See Metzger, *Profession and Constitution*, *supra* note \_\_, at 1277.

<sup>68</sup> *Id.* at 1280 (emphasis in original).



Finally, although the Declaration took the unusual step, prompted by the AAUP's observation that academics were more likely to encounter reprisal for statements in public on general topics than for statements made in the classroom, of protecting statements by academics outside their areas of expertise,<sup>69</sup> it is important to observe that the committee "rejected any view that academic freedom implied an absolute right of free utterance for the individual faculty member."<sup>70</sup> The Declaration is emphatic that "there are no rights without corresponding duties."<sup>71</sup> Thus, "only those who carry on their work in the temper of the scientific inquirer may justly assert" any claim to academic freedom.<sup>72</sup> Significantly, the Declaration assumed that departures from proper professional norms would be monitored and punished by colleagues within the same discipline, rather than lay governors. Nevertheless, from the outset, it was clear that although academics enjoyed a substantial scope of freedom from interference, that freedom was accompanied by additional limitations on their ability to speak, at least to the extent that their speech represented a departure from generally accepted standards of competence and professionalism.<sup>73</sup>

In 1940, the AAUP issued a new declaration, the 1940 Statement of Principles on Academic Freedom and Tenure.<sup>74</sup> Despite some important variations and differences,<sup>75</sup> it remained true to the salient features of the 1915 Declaration discussed above. In particular, it renewed the assertion that academic freedom stemmed primarily from the need to safeguard "the free search for truth and its free exposition."<sup>76</sup> Thus, an academic's freedom to pursue research was "fundamental to the advancement of truth."<sup>77</sup> Similarly, the statement echoed the earlier declaration's focus on preventing interference with academic freedom by the university itself, rather than outside forces, although it cautioned that professors should be duly aware of their obligations to their institutions and speak accordingly.<sup>78</sup> And the statement again warned that academic freedom "carries with it duties correlative with rights."<sup>79</sup>

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<sup>69</sup> See *id.* at 1274-76.

<sup>70</sup> Byrne, *supra* note \_\_, at 277.

<sup>71</sup> 1915 Declaration, *supra* note \_\_, at 401.

<sup>72</sup> *Id.*

<sup>73</sup> See Byrne, *supra* note \_\_, at 277-78.

<sup>74</sup> American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure (1940), reprinted in Van Alstyne, ed., at 407 [hereinafter 1940 Statement].

<sup>75</sup> See Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, in *id.* at 3.

<sup>76</sup> 1940 Statement, *supra* note \_\_, at 407.

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* at 407-08.

<sup>79</sup> *Id.* at 407.

Thus, we can draw a number of conclusions about the nature of professional academic freedom in America, at least in its early stages: (1) It was primarily concerned with academic freedom's role in safeguarding the search for truth, not with any broader democratic or social functions served by higher education. (2) Although it was influenced by a German model of higher education that itself recognized the importance of institutional autonomy, the American version of professional academic freedom was not as concerned with academic self-governance. Because American academics feared interference from internal forces rather than external forces, their version of academic freedom emphasized the neutrality of the academic institution rather than its insulation from outside influence. (3) It recognized that any academic bill of rights must be accompanied by a set of obligations, subject only to the limitation that these obligations were to be enforced by other academics rather than lay governors. Academics were to adhere to the accepted standards of their field of study. Academic freedom was not a liberty; it was a conditional license.

For present purposes, let us focus on the first conclusion – that professional academic freedom was justified on truth-seeking grounds. Two aspects of this conclusion are of particular interest here. First, as Professor Byrne has noted, this argument for academic freedom has long been a site of contestation.<sup>80</sup> A variety of competing values have been advanced as additional, or even primary, values served by higher education. In particular, a number of scholars have argued for a “democratic value in higher education.”<sup>81</sup>

Broadly speaking, the democratic justification for higher education “view[s] education as instrumental, conferring benefits on the general public, rather than as a good in itself or in its diffuse, long-term consequences.”<sup>82</sup> Higher education is thus not simply, or even primarily, valued for its contribution, through research and teaching, to the search for truth. It is not simply a repository of experts. Nor does it strive for neutrality among various visions of the good. Rather, democratic education seeks to serve specific, non-neutral goals directly linked to society at large: it “is . . . committed to allocating educational authority in such a way as to provide its members with an education adequate to participating in democratic politics, to choosing among (a limited range of) good lives, and to sharing in the several sub-communities, such as families, that impart identity to the lives of its citizens.”<sup>83</sup>

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<sup>80</sup> See Byrne, *supra* note \_\_, at 279.

<sup>81</sup> *Id.* at 281.

<sup>82</sup> *Id.*

<sup>83</sup> Amy Gutmann, *Democratic Education* 42 (1987); see also *id.* at 42 (“a democratic state of education tries to teach . . . what might best be called *democratic* virtue: the ability to deliberate, and hence to participate in conscious social reproduction”) (emphasis in original); Suzanna Sherry, *Republican Citizenship in a Democratic Society*, 66 Tex. L. Rev. 1229 (1988) (book review).

Obviously, this is a starkly different vision of the values and functions of higher education, and it may coexist uneasily with the classical vision of the university and of academic freedom described above.<sup>84</sup> Certainly the differing emphasis of these two visions of higher education may result in different views about what are acceptable practices in an institution of higher education. Thus, a purely truth-oriented vision of the university *could* lead to a strict principle of non-discrimination, whether favorable or invidious, in university admissions.<sup>85</sup> By contrast, to the extent an emphasis on the democratic values of higher education stresses the importance of universities in preparing and filling the ranks of future leaders, affirmative action in admissions would be “relevant to one of [the] legitimate social functions” of the university.<sup>86</sup> Thus, democratic educational values may complement or diverge from truth-seeking justifications for higher education; the question will depend on whether the “ideal of the true” and the ideal of the “useful” lead to the same policy prescriptions.<sup>87</sup>

I have focused on two particular visions of the value of universities, and thus, necessarily, of the purpose and value of academic freedom. Other competing values could have been discussed, although I think these two are the most relevant and illustrative.<sup>88</sup> Given the existence of these competing approaches, it follows – and this is my second conclusion – that a court that draws on one of these values alone in defining and shaping *constitutional* academic freedom is making a value-laden choice with potentially significant consequences; at the same time, a court that attempts to incorporate multiple justifications in defining academic freedom risks inconsistency, if not incoherence. Professional academic freedom is not a stable or uniform concept. It is a constantly shifting and deeply contested idea, grounded on very different views of what universities were meant to achieve and how they should operate. Indeed, as if that tension were not enough, other writers have questioned whether an argument for academic freedom can be made on *any* stable and defensible grounds.<sup>89</sup> It is thus unsurprising that, as we shall see, the courts have see-sawed among various visions of what constitutional academic freedom means.

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<sup>84</sup> Of course, it is also quite possible to construct democratic justifications for a broad defense of academic freedom. See, e.g., Gutmann, *id.* at 175-81.

<sup>85</sup> I emphasize that it *could* do so because it need not lead to such a rule. It would not be hard to craft an argument – indeed, Justice Powell seemed to accept such an argument in *Bakke* – that a diversity of views and experiences, including those stemming from racial and ethnic background, contribute to the university’s truth-seeking function.

<sup>86</sup> Gutmann, *supra* note \_\_, at 210.

<sup>87</sup> Byrne, *supra* note \_\_, at 283.

<sup>88</sup> For at least one other value, see Byrne, *id.* at 279-80 (discussing the so-called “humanistic” approach to higher education values).

<sup>89</sup> See, e.g., *The Future of Academic Freedom* (Louis Menand, ed. 1996); David M. Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 Cal. L. Rev. 1377 (1998) (book review); cf. Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 Val. U. L. Rev. 499 (2001) (defending academic freedom on non-foundationalist grounds).

I thus conclude this sub-section with one central observation.<sup>90</sup> *Professional* academic freedom, as opposed to constitutional academic freedom, is a contested and shifting concept, subject to significant disagreement about its purposes, its scope, and even whether it can be justified at all. In understanding the courts' own shifting definition of academic freedom as a constitutional value, including its discussion of academic freedom in *Grutter*, we must appreciate the challenge the courts have faced from the beginning: to attempt to arrive at a stable understanding of a value whose own immediate beneficiaries cannot settle on its meaning. To the extent the courts' discussion of constitutional academic freedom seems inconsistent or incoherent, that fact has much to do with the unstable foundation on which they have built. Conversely, to the extent the courts *can* settle on a stable definition of constitutional academic freedom, it is unlikely to be entirely convincing if, as seems inevitable, it diverges from the shifting understanding of professional academic freedom.

## **B. The Roots of Constitutional Academic Freedom**

### **1. The Pre-*Bakke* Cases: The Birth Pangs of Constitutional Academic Freedom**

With this unstable foundation laid, we may turn from *professional* academic freedom to *constitutional* academic freedom – that is, from the understanding of academic freedom that exists outside the courts to the constitutional understanding of academic freedom as a First Amendment value.

As is the case for most of our First Amendment jurisprudence, academic freedom as a constitutional value is primarily a creature of the 20th Century.<sup>91</sup> Although academic freedom made its first appearance as a potential First Amendment value in a dissent by Justice Douglas in 1952,<sup>92</sup> its true lineage can be traced to a case decided five years later, *Sweezy v. New Hampshire*.<sup>93</sup> Pursuant to a state statute, Paul Sweezy was subpoenaed and questioned by the Attorney General of New Hampshire on a host of subjects, including lectures he had

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<sup>90</sup> The other lesson of the description of professional academic freedom I have offered here – that it carries with it duties as well as rights, and may in fact constrain academic speakers more than ordinary speakers – is addressed again in Part IV, *infra*.

<sup>91</sup> That is not to say that it does not have earlier, deeper roots. For a discussion of those roots, see Finkin, *supra* note \_\_, at 830-40.

<sup>92</sup> See *Adler v. Bd. of Educ.*, 342 U.S. 485, 509 (1952) (Douglas, J., dissenting) (criticizing threat of loyalty proceedings under state law rendering members of subversive organizations ineligible for employment as public school because “[t]he very threat of such a procedure is certain to raise havoc with academic freedom”).

<sup>93</sup> 354 U.S. 234 (1957).

delivered at the University of New Hampshire.<sup>94</sup> He refused to answer and was jailed for contempt.<sup>95</sup>

The Court overturned the conviction on narrow grounds: the state legislature's delegation of authority to the Attorney General was so vague that it was unclear what questions the legislature would have wanted that officer to pursue. Holding Sweezy in contempt for failure to answer these questions thus violated his due process rights.<sup>96</sup> Before reaching this conclusion, however, the Court detoured for a discussion of the First Amendment implications of the case. Writing for a plurality, Chief Justice Warren bluntly asserted that the questions posed to Sweezy constituted "an invasion of petitioner's liberties in the area of academic freedom and political expression – areas in which government should be extremely reticent to tread."<sup>97</sup> The next passage is worth quoting at length:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>98</sup>

Some themes sounded in this passage are worth noting. First, the Court's novel assertion that academic freedom would join political expression as an area "in which government should be extremely reticent to tread"<sup>99</sup> clearly presages the Court's modern approach, prominent in *Grutter*, of deferring to higher educational institutions – for the Court makes clear that its concern is with the academic freedom of universities, not elementary or secondary schools.

It is equally clear, however, that this statement cannot be over-extended. Nothing in the plurality opinion in *Sweezy* suggests that the Court thought government ought to defer to university decision-making as a general matter. Its

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<sup>94</sup> *Id.* at 243-44. For biographical information on Sweezy, see Louis Uchitelle, *Paul Sweezy, 93, Marxist Publisher and Economist, Dies*, New York Times, March 2, 2004, at A25.

<sup>95</sup> *Id.* at 244-45.

<sup>96</sup> *Id.* at 251-55.

<sup>97</sup> *Id.* at 250.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

clear concern was with the regulation of *speech* made in an academic context. There is no hint at this point that government ought to steer clear of other aspects of university life. Nor does the Court indicate that it would be concerned with restrictions on speech initiated by a public university itself, rather than the state. Although the passage embraces “[t]eachers and students” alike,<sup>100</sup> it leaves unaddressed the question of whether a university is entitled to restrict or penalize speech by teachers, whether a university may restrict speech by students, and whether teachers in turn may restrict student speech.

Second, the Court’s conception of academic freedom is grounded first and foremost on the view that academic freedom is necessary to safeguard the search for truth. Academic freedom is necessary on this view to ensure an environment in which “new discoveries,” whether in the hard sciences or in the social sciences, is possible.<sup>101</sup> To be sure, the Court looks beyond the college gates to the “vital role in a democracy that is played by those who guide and train our youth.”<sup>102</sup> But the Court is not here subscribing to the view that academic freedom is important to inculcate democratic values *within* the university. Rather, academic freedom is prized primarily because its contribution to truth-seeking will yield discoveries or insights that will ultimately benefit society at large. Chief Justice Warren’s opinion in *Sweezy* is thus far closer in spirit to the AAUP’s 1915 Declaration than it is to *Bakke* or *Grutter*’s vision of academic freedom.

Justice Frankfurter, joined by Justice Harlan, concurred in the result, but based his concurrence directly on First Amendment grounds. Like the plurality, Frankfurter viewed universities as serving a truth-seeking function, not a democratic function. The public benefit of a university, in his view, was not to create better citizens, but to advance human knowledge.<sup>103</sup> “‘In a university knowledge is its own end, not merely a means to an end.’”<sup>104</sup> If Frankfurter thus sought to protect a university’s “‘atmosphere’” of “‘speculation, experiment[,] and creation,’”<sup>105</sup> it was for instrumental purposes, not in order to serve some larger vision of public dialogue or deliberative democracy.

Like the plurality, Frankfurter argued that universities ought to be left undisturbed by the state. As Byrne notes, Frankfurter “would have held that university freedom for teaching and scholarship without interference from government is a positive right,”<sup>106</sup> which may only be abrogated for “exigent and

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 261-62 (Frankfurter, J., concurring in the result).

<sup>104</sup> *Id.* at 262 (quoting a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand).

<sup>105</sup> *Id.*

<sup>106</sup> *Byrne, supra* note \_\_, at 290.

obviously compelling” reasons.<sup>107</sup> But Frankfurter gave more content to this right, setting out its boundaries more clearly than the plurality’s opinion had. Quoting approvingly from a statement by a group of South African academics, he suggested that “four essential freedoms” govern the life of a properly functioning university: the freedom “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>108</sup>

In those words – the freedom “to determine . . . who may be admitted to study” – lie the jurisprudential roots of *Bakke* and *Grutter* and their command of deference to university admissions programs. But if Frankfurter’s *Sweezy* concurrence has been such fertile ground for future doctrinal developments, it is not because his opinion provides a meaningful definition of constitutional academic freedom or proper guidance on its application. To the contrary, *Sweezy*’s influence stems from the combination of its sweeping grandiloquent rhetoric<sup>109</sup> and its lack of real guidance for future courts.<sup>110</sup>

Frankfurter’s concurrence in *Sweezy* is a curious artifact. The opinion appears to locate the First Amendment freedom it outlines in the protection of the autonomy of the university as a whole. It seeks to protect the university as a separate sphere. To be sure, it does so not strictly for its own sake, nor precisely for the sake of vigorous dialogue within the university, but for the sake of the individual activities – writing, research, teaching – that will thrive in the proper hothouse atmosphere of discussion and debate. But the freedom is nonetheless to apply to the university as a corporate body. Yet the University of New Hampshire had little to do with the facts of the case: *Sweezy* presents a struggle between the state and an *individual* academic, not a university. Despite its grand trappings, then, *Sweezy* offers little clarity about whether the First Amendment right to academic freedom should be thought of as an individual or institutional right. Nor does it offer any prediction of how the courts will deal with intramural conflicts between an academic and the university itself.

<sup>107</sup> *Sweezy*, 354 U.S. at 262.

<sup>108</sup> *Id.* at 263 (quotations omitted). For a discussion of the historical background of the South African scholars’ statement, see Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 45-55 (2002).

<sup>109</sup> See, e.g., Byrne, *supra* note \_\_, at 292 (noting the “fertile ambiguity” produced by “Frankfurter’s loose and essayistic writing”).

<sup>110</sup> Cf. Paul Horwitz, *Law’s Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 Osgoode Hall L.J. 101, 120-25 (2000) (advocating an “open-textured minimalist” approach to judicial opinion writing in constitutional cases during the early stage of the development of new constitutional doctrine, which pairs a minimalist approach to the holding with “provocative, debate-encouraging language” in dicta to spark dialogue while leaving room for future development).

Compounding this uncertainty is a further question: How strongly are we to read Frankfurter's reference to the "four freedoms" of a university? Two questions in particular arise. First, are they to be read as particular freedoms available under the First Amendment, or as general examples of the kinds of liberty that will be safeguarded if the state is precluded from investigating academic *speech* only? A proper reading of the opinion, with its reference to the presumptive freedom of "thought *and action*" in the academy from government intrusion,<sup>111</sup> suggests that Frankfurter intended the more protective reading to apply. But even if the statement had come in the plurality opinion and not a mere concurrence, it again sweeps far outside the facts of the case before the Court.

The concurrence also provides minimal guidance on another question: What is the scope of these four freedoms? Are they absolute or subject to internal or external limitations? Here, *Sweezy* provides some guidance, albeit minimal: The university is free to act within the sphere of the four freedoms to the extent its decisions are based "on *academic grounds*."<sup>112</sup> Thus, a determination such as an admission decision that is based on non-academic grounds is entitled to no special protection under the rubric of constitutional academic freedom. That limitation, of course, begs the question of what should be considered "academic grounds" for a decision, and on this point the opinion is silent. Nevertheless, that internal limitation underscores the importance to academic freedom doctrine of the Court's understanding of the function of universities. As the discussion of *Bakke* and *Grutter* that follows will suggest, much turns on whether the Court believes universities are a site for the search for truth, or whether they serve additional functions.

In one area, at least, Frankfurter is sufficiently clear. Subsequent commentators have objected that a strong principle of constitutional academic freedom would grant constitutional rights to universities or academics not enjoyed by other First Amendment speakers.<sup>113</sup> But the concurrence properly emphasizes that the freedoms accorded to the university do not confer a special status on the university for its own sake, but for the ultimate benefit of the public.<sup>114</sup> Again, this suggests that *Sweezy*'s vision of academic freedom has little to do with a civic democracy view of education; the purpose of college is not simply to breed more thoughtful, sensitive citizens. It is to provide the public with the more immediate fruits of research, teaching, and scholarship – the advancement of knowledge. In any event, although the categories of academic freedom listed by Frankfurter –

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<sup>111</sup> *Sweezy*, 354 U.S. at 1219 (emphasis added).

<sup>112</sup> *Id.* at 263 (emphasis added).

<sup>113</sup> See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 412 n.13 (4th Cir. 2000) (en banc) ("[W]e note that the argument [that professors are entitled to academic freedom protections under the First Amendment] raises the specter of a constitutional right enjoyed by only a limited class of citizens.").

<sup>114</sup> *Sweezy*, 354 U.S. at 262.



freedom to select a curriculum, to determine who may be admitted to study, and so forth – are specific to educational institutions, the opinion suggests that First Amendment academic freedom simply tracks the same core activities protected when individuals engage in political speech.<sup>115</sup>

Whatever unanswered questions it may have left in its wake, *Sweezy* was a landmark moment in the development of constitutional academic freedom. It marks the first occasion on which the Court identified academic freedom as a First Amendment right, although the plurality rested on other grounds. *Sweezy* strongly suggests that academic freedom inheres in the institution as a whole: it is thus less an individual right that operates as a trump *against* the state, and more an attempt to define the university life as an area into which the state is presumptively forbidden to intrude. Still, any understanding of *Sweezy*'s implications must take account of its context. The case itself did not involve institutional speech. Nor did it involve less speech-oriented matters such as university admissions. Most important, *Sweezy* relies on a narrow conception of the purpose of a university, one that emphasizes the search for truth and not any alternative justifications for academic freedom.

This trend continued in the next major Supreme Court discussion of constitutional academic freedom, *Keyishian v. Board of Regents of the University of the State of New York*.<sup>116</sup> Like the earlier *Adler* case, which involved the same law, *Keyishian* was fundamentally a loyalty oath case. The case involved a challenge to a state law requiring employees of public educational institutions to certify that they were not Communists and to disclose any past affiliations to the Communist Party.<sup>117</sup>

Unlike *Sweezy*, *Keyishian* was decided on First Amendment grounds. Like the earlier case, the grounds offered had little to do with academic freedom. The Court struck down the law as impermissibly vague. Thus, no special rights of academic freedom, institutional or individual, were required to address the case before it. Again, however, the Court could not resist adding a broader discussion of the institutional context in which the case arose. Justice Brennan wrote:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas

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<sup>115</sup> See *id.* at 266.

<sup>116</sup> 385 U.S. 589 (1967).

<sup>117</sup> *Id.* at 591-94.

which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.<sup>118</sup>

In keeping with the narrow factual context in which it arose – state regulation of teachers' political affiliations – and the narrow legal grounds on which it was decided, *Keyishian* sounds many of the same themes as *Sweezy*, and the discussion is equally unnecessary. It situates academic freedom squarely within the First Amendment and treats it as a right against the state, without addressing how or whether the public university itself may govern speech on campus. And it emphasizes that any special rights enjoyed by the university are “of transcendent value to all of us and not merely to the teachers concerned.”<sup>119</sup>

What is significant here is the subtle shift in the Court's justification for constitutional academic freedom. Although the passage quoted above appears to invoke the same truth-seeking value offered by the plurality and concurring opinions in *Sweezy*, there are in fact two justifications at work here. The Court is concerned not only with the knowledge that is the *product* of the search for truth, but with the civic value of the *process* of discussion itself. It is less concerned with the particular truths that may emerge “out of a multitude of tongues”<sup>120</sup> than it is with the capacity of vigorous discussion to produce citizens who are accustomed to the “robust exchange of ideas.”<sup>121</sup>

*Keyishian*'s reference to the classroom as “peculiarly the marketplace of ideas” is, on this reading, misleading.<sup>122</sup> The marketplace of ideas metaphor is generally understood to relate directly to the search for truth: “the best test for truth is the power of the thought to get itself accepted in the competition of the market.”<sup>123</sup> *Keyishian*, on the other hand, is less interested in the results of that competition than it is in the social value of training future leaders and other citizens in the habit of vigorous dialogue. If *Keyishian* finds its roots elsewhere in First Amendment doctrine, then, they lie not in Holmes' *Abrams* dissent but in Justice Brandeis's concurring opinion in *Whitney v. California*,<sup>124</sup> which was

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<sup>118</sup> *Id.* at 603 (quotations and brackets omitted).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> For discussions of *Keyishian* that focus on the marketplace of ideas concept, see, e.g., David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, in *Freedom and Tenure in the Academy* 228, 240 (William W. Van Alstyne, ed. 1993); John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, The Academy, and the McCarran-Walter Act*, 66 Tex. L. Rev. 1481 (1988); Mark G. Yudof, *Three Faces of Academic Freedom*, 32 Loy. L. Rev. 841 (1987).

<sup>123</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1920) (Holmes, J., dissenting).

<sup>124</sup> 274 U.S. 357 (1927).

similarly concerned with inculcating a free citizenry that is accustomed to public discussion and debate.<sup>125</sup>

*Keyishian* thus marks a significant shift in the Court's understanding of academic freedom: while the traditional justification for academic freedom both in the academy and in the Court's jurisprudence had turned on the search for truth, the Court now suggested that academic freedom serves quite another democratic virtue: the training and shaping of the nation's citizens. That shift is important for at least two reasons. First, to the extent future applications of the constitutional principle of academic freedom may turn on the underlying purposes of academic freedom, it is important to understand what those purposes are. More broadly, though, constitutional academic freedom must be understood not just on its own terms, but in terms of its relationship to First Amendment doctrine. Any justifications raised in support of academic freedom may have equal application and important implications elsewhere in the First Amendment; conversely, if the democratic justification of the First Amendment has found little traction elsewhere in the caselaw, academic freedom doctrine may stand all the more exposed for its inconsistency with the broader body of law.

*Sweezy* and *Keyishian* provided the richest descriptions of the Court's understanding of the constitutional dimensions of academic freedom, albeit they remained inconsistent and grounded on at least two distinct theoretical bases. Subsequent caselaw did little to give further shape to the doctrine.<sup>126</sup> In one case, *Healy v. James*,<sup>127</sup> the Court did add some additional information about the scope of academic freedom. In holding that Central Connecticut State College had improperly denied the campus chapter of Students for a Democratic Society certification as a campus group, the Court necessarily suggested that academic freedom may in proper circumstances be a right held by against the public university itself by members of the university community – in this case, students. To be sure, as in *Sweezy* and *Keyishian*, the Court could have reached the same ruling without referring to academic freedom. It could simply have held that the college had failed to act in a viewpoint-neutral fashion with respect to speech within what was basically a public forum. But the Court went further, situating

<sup>125</sup> For discussion of *Whitney*, see, e.g., Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 Wm. & Mary L. Rev. 653 (1988); Paul Horwitz, *Citizenship and Speech*, 43 McGill L.J. 445 (1998).

<sup>126</sup> See, e.g., Ailsa W. Chang, Note, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 Stan. L. Rev. 915, 922 (2001); but see William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, in Van Alstyne, ed., *supra* note \_\_, at 79 (purporting to find "some clearer sense of what counts as an academic freedom interest" in the post-*Keyishian* caselaw).

<sup>127</sup> 408 U.S. 169 (1972).

the student group's claim within "this Nation's dedication to safeguarding academic freedom."<sup>128</sup>

*Healy* thus suggests that the "four freedoms" identified in Frankfurter's *Sweezy* concurrence – including, presumably, the freedom to determine who may be admitted to study – do not delineate spheres of absolute non-intrusion for university officials. They are subject not only to the requirement that the university act on "academic" grounds,<sup>129</sup> but may potentially be subject to whatever competing academic freedom rights can be asserted by other members of the university community.<sup>130</sup>

At the same time, *Healy* suggests those limits work both ways: the Court made clear that student groups on campus would still be required to abide by generally applicable rules of conduct governing the university – SDS could not "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."<sup>131</sup> Again, that conclusion is an unexceptional exercise of time, place, and manner doctrine. Because the *Healy* Court invoked academic freedom, however, we may read the limitation for something more. It suggests that academic freedom rights are subject to constraints *specific* to the unique circumstances of the university. After all, *Healy* involved certification of a student group, which allowed it to post notices on campus bulletin boards, hold meetings, and other such actions.<sup>132</sup> The Court's conclusion that SDS could have been refused certification altogether if it was unwilling to abide by the university's rules of conduct suggests that, where conflicts with the rules of civility that govern university speech are concerned, permissible restrictions on speech may be broader on campus than off-campus.

## 2. *Bakke*: "... Who May Be Admitted to Study"

All of the cases discussed so far deal with paradigmatic speech acts, and could have reached the same results without any recourse to a novelty like academic freedom. *Bakke*<sup>133</sup> is a different story altogether. For the first time, the Court invoked one of the "four freedoms" of *Sweezy* that has little to do directly with speech: the freedom "to determine . . . who may be admitted to study."<sup>134</sup> *Bakke* represents perhaps the Court's most significant affirmation to that date that academic freedom was not simply an individual right, but contained a significant

<sup>128</sup> *Id.* at 180.

<sup>129</sup> See *supra* note \_\_ and accompanying text.

<sup>130</sup> For discussion of the competing interests involved in intramural speech within the university, see, e.g., Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 Tex. L. Rev. 1323 (1988).

<sup>131</sup> *Healy*, 408 U.S. at 189.

<sup>132</sup> *Id.* at 176.

<sup>133</sup> *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

<sup>134</sup> *Sweezy*, 354 U.S. at 263.

component of institutional autonomy for colleges and universities.<sup>135</sup> If taken seriously as a First Amendment case, *Bakke* considerably develops the doctrine of constitutional academic freedom.<sup>136</sup> Whether it ought to be taken seriously as a First Amendment case, as we shall see, is another matter.

The facts of the case are well known and need not long detain us. *Bakke* brought suit challenging the admissions policies of the University of California at Davis's medical school, which ensured admission to a specified number of minority applicants.<sup>137</sup> A fractured Court held that the school's admissions policy was illegal, but that the Constitution did not bar the consideration of race as one of a number of "plus" factor in an admissions decision.

In his pivotal opinion, Justice Powell rejected all the grounds advanced by the university in support of its admissions programs, save one: "the attainment of a diverse student body."<sup>138</sup> That interest was linked directly to academic freedom, "a special concern of the First Amendment."<sup>139</sup> Under the "fourth" element of constitutional academic freedom enumerated in *Sweezy*, a university must be free "to make its own judgments as to education[,] includ[ing] the selection of its student body."<sup>140</sup> The Court drew on *Keyishian* to emphasize the importance of the "robust exchange of ideas" on campus.<sup>141</sup> That robust exchange of ideas "is widely believed to be promoted by a diverse student body."<sup>142</sup> The university's judgment that racially diverse admissions would help create an atmosphere of robust discussion thus posted a "countervailing constitutional interest, that of the First Amendment,"<sup>143</sup> which constituted a compelling state interest.<sup>144</sup>

Viewed strictly for its First Amendment value, a number of aspects of Justice Powell's opinion in *Bakke* merit discussion. First, it offers further evidence that the Court's view of academic freedom itself had changed over time, although its view was stated with something less than clarity. As we have seen, the Court to this point had variously described constitutional academic freedom as serving the search for truth and as serving the more democratic function of training leaders habituated to engaging in the robust exchange of ideas. The only

<sup>135</sup> See Byrne, *supra* note \_\_, at 313.

<sup>136</sup> See, e.g., Yudof, *supra* note \_\_, at 854.

<sup>137</sup> *Bakke*, 438 U.S. at 269-70.

<sup>138</sup> *Id.* at 311.

<sup>139</sup> *Id.* at 312.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (quoting *Keyishian*, 385 U.S. at 603).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 313.

<sup>144</sup> Cf. Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*, 67 Calif. L. Rev. 69, 75-76 (1979) (observing that Justice Powell's reliance on diversity in *Bakke* focused on "an interest of the institution . . . rather than an interest held by the represented minority group.") (emphasis omitted).

case suggesting that a university should enjoy autonomy in its admissions decisions, *Sweezy*, was clearly grounded in the search for truth and no other value. Indeed, to the extent the *Sweezy* concurrence tracks the AAUP's 1915 principles in hewing to the search for truth justification, it was unlikely to offer much support for diversity-oriented admissions policies, let alone race-conscious admissions.<sup>145</sup>

But although Powell relies on *Sweezy* for the right to make admissions decisions, it is difficult to find any trace of its underlying justification in *Bakke*. Instead, Powell explains academic freedom in terms closer to those used in *Keyishian*: universities must be free to seek a diverse student body because the nation's future leaders ought to be exposed to a wide range of "ideas and mores."<sup>146</sup>

*Bakke* is also noteworthy for its indication that academic freedom means universities "must have wide discretion in making the sensitive judgments as to who should be admitted."<sup>147</sup> As Timothy Hall observes, it was on this ground that the university staked its argument in *Bakke*.<sup>148</sup> But whatever autonomy the universities may have won in *Bakke*, it is far from unbounded. Institutional autonomy is still subject to the constraint of "constitutional limitations protecting individual rights."<sup>149</sup>

Moreover, by settling on and emphasizing diversity as a compelling state interest, Powell specifies the grounds on which universities may engage in admissions decisions, rather than leaving those institutions free to make admissions decisions on any academic grounds they wish to select. If any opinion in *Bakke* truly represents the institutional autonomy strand of academic freedom, it is not Powell's, but Justice Blackmun's.<sup>150</sup> Rather than focus on the particulars of the admissions programs at issue, Blackmun simply places his faith in the hands of the universities, arguing that "[t]he administration and management of educational institutions are beyond the competence of judges and . . . within the special competence of educators," subject to constitutional limits.<sup>151</sup>

<sup>145</sup> See Byrne, *supra* note \_\_\_, at 314 ("To the drafters of the AAUP's 1915 Statement, benefitting a scholar because of his race would have been as repulsive in principle as penalizing him."); Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 Ohio St. L.J. 551, 578-79 (1998).

<sup>146</sup> *Bakke*, 438 U.S. at 313.

<sup>147</sup> *Id.* at 314.

<sup>148</sup> Hall, *supra* note \_\_\_, at 581.

<sup>149</sup> *Bakke*, 438 U.S. at 314.

<sup>150</sup> On this point, Wendy Parker observes that Justice Blackmun's opinion is the true predecessor of Justice O'Connor's opinion in *Grutter*. See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 Wm. & Mary L. Rev. 1691, 1700 n.51 (2004).

<sup>151</sup> *Bakke*, 438 U.S. at 404 (Blackmun, J.).

In sum, *Bakke* represents a significant change in the Court's treatment of academic freedom. Notwithstanding Frankfurter's opinion in *Sweezy*, academic freedom up until this point had been relevant only to disputes involving academic *speech*, whether by professors or students; the Court had never applied the principle to academic institutional decision-making. Justice Powell's treatment of diversity left it unclear whether his approval of diversity as a compelling interest was based on the principle of deference to the autonomy of the university or on a more intrusive blessing of the particular justification offered by the university for diversity in admissions. But it is at least evident that the Powell opinion in *Bakke* had moved a considerable distance from the truth-seeking justifications offered in support of academic freedom by the AAUP and the Supreme Court's earlier decisions. Nevertheless, given the peculiar place of academic freedom in the case – its status as a “countervailing value” rather than a clearly defined ground for decision – *Bakke*'s import as a First Amendment case was far from clear.

### 3. *Grutter: Revisiting Constitutional Academic Freedom*

If, as I observed at the beginning of this paper, *Bakke* never made its way into the First Amendment canon, one reason is surely that few observers took Justice Powell's reasoning on this point seriously, at least in its implications for academic freedom. Mark Yudof, for example, noted his suspicion that “the Powell approach to academic freedom . . . was for that day and trip only and that this face of academic freedom will quickly fade.”<sup>152</sup>

The evidence in favor of this view was mixed. On the one hand, the Court in subsequent decisions paid lip service to the principle of educational institutional autonomy set out in *Bakke*. On at least two occasions, the Court turned back student due process challenges to university decisions dismissing them from academic programs.<sup>153</sup> On both occasions, the Court stressed that courts owe great deference to “genuinely academic decision[s]” made by university faculties.<sup>154</sup>

These decisions, as Yudof notes, simply refused to interfere with an established decision-making procedure within the university. When those procedures were challenged, however, or when a university sought to carve out additional rights against the state on the basis of institutional autonomy, the Court rebuffed those attempts.<sup>155</sup> Thus, in *Minnesota State Board for Community Colleges v. Knight*,<sup>156</sup> the Court rejected a challenge by community college

<sup>152</sup> Yudof, *supra* note \_\_, at 855-56; see also Byrne, *supra* note \_\_, at 315.

<sup>153</sup> See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978). *Horowitz* was actually decided shortly before *Bakke*.

<sup>154</sup> *Ewing*, 474 U.S. at 225; see also *Horowitz*, 435 U.S. at 90-92, 96 n.6.

<sup>155</sup> Yudof, *supra* note \_\_, at 856-57.

<sup>156</sup> 465 U.S. 271 (1984).

instructors to a state statute requiring public employers to bargain on certain issues with the exclusive bargaining representative selected by their professional employees, holding that there was no “constitutional right of faculty to participate in policymaking in academic institutions.”<sup>157</sup> Thus, notwithstanding the Court’s repeated call for deference to academic decisions based on “the faculty’s professional judgment,”<sup>158</sup> faculty were not constitutionally entitled to participate in the formulation of academic policy. And in refusing to grant a university any privilege against the disclosure of confidential peer review materials in job discrimination suits, the Court emphasized that its “so-called academic-freedom cases” all involved instances of content-specific speech regulation and nothing more.<sup>159</sup> “The post-*Bakke* decisions [thus] appear[ed] to reinforce the view that institutional academic freedom in the public sector is a make-weight.”<sup>160</sup>

The past Term’s decision in *Grutter* makes clear that *Bakke* was something more than a ticket good for one day and time only. In holding that the University of Michigan Law School had “a compelling interest in attaining a diverse student body,”<sup>161</sup> based on principles of academic freedom grounded in the First Amendment, the Supreme Court gave a far more detailed explanation of the purpose and scope of educational institutional autonomy than the discussion offered by Justice Powell in *Bakke*. Justice O’Connor’s discussion of academic freedom in *Grutter* may be considered more carefully by looking in turn at a number of key elements.

*Deference to educational institutions.* The most significant hurdle facing the Law School in *Grutter* was the Court’s increasingly demanding use of strict scrutiny in reviewing all governmental classifications by race, whether for benign or malevolent purposes.<sup>162</sup> Although the Court purported to be applying strict scrutiny here, it is surely right to observe that its actual approach demonstrated “remarkable latitudinarianism.”<sup>163</sup> The key to understanding that approach lies in the Court’s posture of deference toward academic institutions. The Court places its approach within its purported “tradition of giving a degree of deference to a

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<sup>157</sup> 465 U.S. at 287.

<sup>158</sup> *Ewing*, 474 U.S. at 225.

<sup>159</sup> *Univ. of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990).

<sup>160</sup> Yudof, *supra* note \_\_, at 857. But see Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 Ohio St. L.J. 663, 717 (1987) (arguing that the Court’s reliance on institutional academic freedom in *Ewing* demonstrates that Justice Powell’s discussion of educational institutional autonomy in *Bakke* was not merely a “theoretical stretch made necessary by the peculiar demands of affirmative action as a national policy”).

<sup>161</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>162</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>163</sup> Peter H. Schuck, *Reflections on Grutter*, *Jurist*, available at <http://jurist.law.pitt.edu/forum/symposium-aa/schuck.html> (Sept. 9, 2003)



university's academic decisions, within constitutionally prescribed limits."<sup>164</sup> Thus, Justice O'Connor suggests, its strict scrutiny of the Law School's admissions policies must "tak[e] into account complex educational judgments in an area that lies primarily within the expertise of the university,"<sup>165</sup> albeit within constitutional limits.<sup>166</sup>

This deference is extraordinary for a number of reasons. First, it represents a strong reaffirmation that the Court stands by its prior statements singling out universities as institutions uniquely worthy of substantial deference. Certainly the Law School was accorded a deference far beyond that granted to any other institution whose affirmative action policies had come before the Court since *Bakke*.

Moreover, notwithstanding the Court's rhetoric, it is unlikely that the deference the Court showed toward the Law School can be based simply on the fact that universities make "complex educational judgments."<sup>167</sup> Every institution makes complex judgments. As Peter Schuck notes, those institutions whose programs had failed strict scrutiny between *Bakke* and *Grutter* – employers, government agencies, and others – are not so differently situated from academic institutions. They operate with some greater level of expertise and experience with respect to their own affairs than a court would be likely to possess. They presumably structure their policies with the particular circumstances of their profession or institution in mind. And they are subject to a host of "political, ideological, competitive, social, legal, and institutional pressures," both internal and external.<sup>168</sup> The Court's hands-off treatment of the Law School's program must be based on its regard for the special social role of educational institutions, and not merely on its respect for the expert judgment of educators.

Finally, if one takes the Court's opinion seriously, it is clear that deference to the Law School's educational judgments performed real work in *Grutter*. In the face of the Court's stringent approach in recent cases to the requirement that racial distinctions be "narrowly tailored to achieve [the] compelling state interest,"<sup>169</sup> it is hard to believe that the Court would have left the Law School so free a hand to shape its admissions policies had it not proceeded from a posture of deference to university decision-making.<sup>170</sup> So, if one assumes the Court meant what it said and did not simply refer to the need to defer to educational

<sup>164</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 2339.

<sup>168</sup> Schuck, *supra* note \_\_\_\_.

<sup>169</sup> *Grutter*, 123 S. Ct. at 2341.

<sup>170</sup> See, e.g., Schuck, *supra* note \_\_\_\_ ("Justice O'Connor's strict scrutiny has all the strictness of an indulgent mother who gives her affable son the keys to the family car without questioning him about his drinking.").

institutions as a make-weight in support of its Fourteenth Amendment conclusions, deference made a significant difference in *Grutter*.

The Court's approach is all the more remarkable because it is not clear that the level of deference displayed in *Grutter* is justified by the caselaw. Although the Court cites its decisions in *Ewing* and *Horowitz* in addition to *Bakke*, and both cases speak in strong terms about the importance of respecting the discretion of university faculties,<sup>171</sup> neither opinion comes close to suggesting the kind of deference applied here. Those cases merely held that even if students were entitled to due process protection when public universities make decisions affecting their enrollment, the procedures in place at those schools were sufficient to satisfy those rights. Neither case suggests that the Court owes universities the level of deference they were given by the *Grutter* majority.

Conversely, when universities argued on institutional autonomy grounds for a limited carve-out from the EEOC's disclosure requirements for peer review materials, the Court did not hesitate to shut down the argument, asserting the right to determine for itself what constitutes legitimate or illegitimate academic decision-making.<sup>172</sup> It is a curious form of deference to deny a university the right to maintain the confidentiality of peer review materials while permitting it to exercise its own best judgment in crafting admissions policies that may skirt the boundaries of the Fourteenth Amendment.

*Academic freedom and institutional autonomy.* Justice O'Connor's opinion in *Grutter* links the Court's deferential treatment of the Law School to the broader constitutional value of academic freedom. "Universities," the Court makes clear, "occupy a special place in our constitutional tradition."<sup>173</sup> Specifically, the Court affirms Justice Powell's statement in *Bakke* that universities enjoy a constitutional "dimension" of "educational autonomy," including the right to make its own decisions on whom to admit to study.<sup>174</sup> The Court did not note, as it has in the past, the shifting and uneasy nature of the question whether academic freedom inheres in the individual, the institution, or both.<sup>175</sup>

<sup>171</sup> See, e.g., *Ewing*, 474 U.S. at 225 n.11.

<sup>172</sup> See *Univ. of Pennsylvania*, 493 U.S. at 199.

<sup>173</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>174</sup> *Id.*

<sup>175</sup> See *Ewing*, 474 U.S. at 226 n.12 ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the university itself") (citations omitted). For criticism of the Court's reliance in *Grutter* on institutional autonomy, see Richard H. Hiers, *Institutional Academic Freedom – A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J. Coll. & Univ. L. 531 (2004).

What is not clear from *Grutter* is whether *any* exercise of institutional autonomy by a university, or at least those involving “academic decisions,”<sup>176</sup> operates within a sphere of government non-interference. The Court seconded Justice Powell’s invocation of the right to “make its own judgments as to . . . the selection of its student body.”<sup>177</sup> But that point is closely tied to the Court’s discussion of the particular merits of diversity in education, which I discuss immediately below. Would a university’s invocation of academic freedom insulate from attack some other set of admissions criteria not tied to diversity if those criteria raised constitutional questions? *Grutter* does not answer that question. The implications of this open issue will be treated at length later in this paper.

*Academic freedom and student diversity.* The core of *Grutter*’s First Amendment discussion is its treatment of the Law School’s proffered compelling interest: “obtaining the educational benefits that flow from a diverse student body.”<sup>178</sup> On this point, the Court provides an illuminating discussion with profound potential implications for constitutional academic freedom. Drawing on Justice Powell’s citation of *Keyishian* in *Bakke*, the Court accepted that a diverse student body will contribute to the “robust exchange of ideas,” and held that the Law School’s search for a critical mass of minority students would serve that end.<sup>179</sup>

Significantly, the Court’s holding that the Law School had a compelling interest in the educational benefits of diversity was “informed by our view that attaining a student body is at the heart of the Law School’s educational mission.”<sup>180</sup> This statement can be read in a number of ways. Perhaps the Court was simply acknowledging here that the Law School’s institutional autonomy gave it the freedom to set its own educational goals, which would qualify as a compelling interest. That reading is supported by the prelude to the Court’s discussion of educational diversity, which sounds precisely those notes. Similarly, perhaps the Court meant to suggest that any set of admissions policies – including but not limited to diversity-oriented policies – that qualified under some unarticulated definition as the result of an “academic decision” would be entitled to the same degree of deference.

In truth, there seems to be something more going on here. Although this section of the Court’s opinion focuses on the First Amendment, and although the scope of this paper is limited to that issue, obviously the Court’s treatment of academic freedom is significantly underwritten by the Fourteenth Amendment

<sup>176</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>177</sup> *Id.* (quotations and citations omitted).

<sup>178</sup> *Id.* at 2338 (quotation and citation omitted).

<sup>179</sup> *Id.* at 2339.

<sup>180</sup> *Id.*

context in which the case arose. Thus, a third natural reading of the Court's opinion in *Grutter* suggests that, far from deferring to the general expertise of academic officials, the Court here offered its own blessing on the educational benefits of diversity. If so, of course, that is precisely the kind of "complex educational judgment[ ]"<sup>181</sup> that the Court had just declared itself incompetent to evaluate.

Certainly that reading of the Court's treatment of the Law School's diversity argument is supported by the depth and breadth of its discussion of the benefits of racial and ethnic diversity in education. Far from relying on the Law School's own determination on that issue, the Court offers extensive discussion of the educational benefits of student exposure to classmates of different backgrounds: it "promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races."<sup>182</sup>

Significantly, the Court's tribute to the benefits of student diversity looked beyond the immediate pedagogical benefit of learning in a diverse environment to the external benefits of student diversity – its value in preparing students as citizens, workers, and leaders.<sup>183</sup> The Court stressed the democratic value of diversity in education, its capacity to prepare students "for work *and* citizenship."<sup>184</sup> Diversity in this view serves a dual purpose: to prepare students for citizenship by exposing them to diverse views, and to ensure that a diversity of views are heard in the polity by taking measures to provide the benefits of higher education to members of diverse racial and ethnic groups.<sup>185</sup> And the Court added that in the context of elite legal education, diversity helps members of different races achieve eventual leadership and so ensures that those leaders have "legitimacy in the eyes of the citizenry."<sup>186</sup>

Having canvassed the Court's prior caselaw on academic freedom, it should be evident on this account that *Grutter* is not merely a restatement of the Court's prior views. There is little here that the authors of the *Sweezy* majority or concurrence would recognize as following from their handiwork. In particular, there is no trace in *Grutter* of the truth-seeking rationale for constitutional academic freedom that was the centerpiece of both opinions in *Sweezy*, and that was the core of the original AAUP principles.

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 2339-40 (quotations and citations omitted).

<sup>183</sup> *Id.* at 2340-41.

<sup>184</sup> *Id.* at 2340 (emphasis added).

<sup>185</sup> *Id.* at 2340-41.

<sup>186</sup> *Id.* at 2341.

Nor does *Grutter* perforce rest on the reasoning in *Keyishian*, or even the reasoning in *Bakke*. True, *Grutter* shares with the earlier cases a shift from a truth-seeking to a democratic rationale for academic freedom. But *Keyishian* and *Bakke* ultimately remained safely within the college gates, arguing that a proper democratic education would give students exposure to the vigorous clash of ideas. Thus, Justice Powell, quoting *Keyishian*, focused on the contribution made by a diverse student body to an "atmosphere of speculation, experiment and creation" in the academy.<sup>187</sup> *Grutter*'s First Amendment shares that concern,<sup>188</sup> but adds something more. Here, the concern is not merely with the *quality* of education, with its capacity to prepare students for work and citizenship; the Court is concerned that education be *representative*, irrespective of the immediate educational benefits supplied by a diverse student body.

To be sure, that reasoning follows as much (or more) from the Court's Fourteenth Amendment premises as its First Amendment premises. But the two cannot be easily disaggregated. *Grutter* presents a detailed vision of the social role of education, particularly elite higher education. Although that vision cannot but help sound in terms of equal protection, it is ultimately still a statement about the "proper institutional mission" of the university, and thus about the basis for constitutional academic freedom.<sup>189</sup>

I do not mean at this juncture to criticize that vision. Indeed, whether or not *Grutter* is a sound application of the specific principle(s) of constitutional academic freedom, it surely is consistent not only with our constitutional ideals but with a longstanding stream of thought about the broader democratic purposes of the university.<sup>190</sup> But *Grutter*'s vision of academic freedom is still indisputably one that would be unrecognizable to the framers of the AAUP principles, or to the drafters of the early academic freedom cases.<sup>191</sup>

In sum, then, *Grutter* may represent a significant moment in the development of the law of academic freedom. Again, as with *Bakke*, whether it does not or not will depend on whether the Court takes its own words seriously or treats the case as a "sport" for First Amendment purposes.<sup>192</sup> But as a First Amendment case, it raises a number of issues worthy of serious attention and

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<sup>187</sup> *Bakke*, 438 U.S. at 312.

<sup>188</sup> See *id.* at 2340 (discussing diversity's contribution to lively classroom discussion).

<sup>189</sup> See Jack Greenberg, *Diversity, The University, and the World Outside*, 103 Colum. L. Rev. 1610, 1619 (2003) ("Justice O'Connor structures her argument so that preparation for the world beyond graduation has the constitutional protection of being a subset of academic freedom.").

<sup>190</sup> See Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 Colum. L. Rev. 1589, 1591-92 (2003).

<sup>191</sup> See Hall, *supra* note \_\_, at 578-79 (making similar point with respect to *Bakke*).

<sup>192</sup> See Yudof, *supra* note \_\_, at 855-56 (discussing fate of *Bakke* as academic freedom case).

reflection: (1) It buttresses the view that educational institutions are entitled, on First Amendment grounds, to substantial autonomy in their decision making. (2) It reaffirms that “complex educational judgments”<sup>193</sup> will be given substantial deference by the courts – indeed, enough deference to overcome strict scrutiny under the Equal Protection Clause. (3) Although it is difficult to discern which elements of the Court’s discussion of educational diversity speak to its First Amendment understanding and which speak to issues of equal protection, *Grutter* also represents a further move away from a truth-seeking rationale for constitutional academic freedom, and toward one that focuses instead on the internal and external democratic goals served by higher education.

### III. TAKING *GRUTTER* SERIOUSLY

This section aims to do something the Court and commentators likely will not do: it proposes to take *Grutter* seriously as a First Amendment decision. If read for all it is worth, *Grutter* has a number of wide-ranging and significant First Amendment implications.

For these purposes, *Grutter* may be read in one of two ways. First, it could be read for its enthusiastic support for the “constitutional dimension, grounded in the First Amendment, of institutional autonomy.”<sup>194</sup> That reading assumes that the particular educational goals put forward by a university are less important to the courts than the fact that the goals are propounded by educators making “complex educational judgments.”<sup>195</sup> On this view, provided a university policy is based on genuine academic reasons, it is entitled to act substantially free of government interference. It may only act “within constitutionally prescribed limits,”<sup>196</sup> but as *Grutter* itself suggests, it may certainly skirt those limits and will in fact be given considerable latitude to do so. This institutional autonomy reading of *Grutter* offers support for positions – often, conflicting positions – taken by partisans on both sides of a host of First Amendment and educational policy debates.

The second reading of *Grutter* focuses not on institutional autonomy, but on the Court’s justification for academic freedom, and for the Law School’s admissions policies in that case. It asks what First Amendment implications follow from a conception of academic freedom centered around the democratic function of higher education: its role in preparing students to serve as citizens, and in serving as an entry point for a more representative set of elite professionals, citizens and leaders.<sup>197</sup> This approach to *Grutter* carries a different set of

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<sup>193</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>194</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *See id.* at 2340-41.

implications for particular First Amendment disputes. More importantly, however, this reading of *Grutter* suggests that significant faultlines exist between the Court's approach in this case and its approach in other areas of First Amendment doctrine.

## A. Institutional Autonomy and its Implications

Begin with the assumption that *Grutter* stands for the proposition that courts will defer to a substantial degree, though within loosely defined constitutional limits, to an institution of higher education's academic judgments about whether certain programs or measures will serve its educational interests.<sup>198</sup> What measures might a university justify under this standard?

### 1. Hate Speech on Campus

An obvious candidate for reexamination under *Grutter*'s strongly deferential approach to university officials is the question of the constitutionality of campus speech codes. The late 1980's and early 1990's saw a flurry of efforts by universities to regulate hostile speech targeted at individuals on campus by virtue of their race, sex, ethnicity, and so forth.<sup>199</sup> The University of Michigan, for example, adopted a policy on discrimination and discriminatory harassment that created grounds for disciplining anyone who engaged in "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status,"<sup>200</sup> provided it met certain other conditions. Among the specified circumstances in which this sort of speech would be grounds for discipline were cases in which the speech "has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety."<sup>201</sup> Although these measures sparked enormously heated debates, they were largely abandoned or allowed to fade into obscurity after several courts found such codes unconstitutional.<sup>202</sup>

Those cases relied largely upon general First Amendment doctrine, rejecting or giving short shrift to any argument that the courts should defer to the judgment of the universities that had promulgated the codes. Thus, in *Doe v. University of Michigan*, the district court struck down the University of Michigan policy described above on vagueness and overbreadth grounds.

<sup>198</sup> See *id.* at 2339 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . within constitutionally prescribed limits.").

<sup>199</sup> The materials discussing this topic are voluminous. For a history of these developments, see Timothy C. Shiell, *Campus Hate Speech on Trial* (1998).

<sup>200</sup> *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989).

<sup>201</sup> *Id.*

<sup>202</sup> See Robert M. O'Neill, *Free Speech in the College Community* 20-21 (1997).

Academic freedom did no significant work in the case. To the contrary, the court suggested that the *general* First Amendment principles it cited, such as the importance of content neutrality, “acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution’s educational mission.”<sup>203</sup> But academic freedom provided no thumb on the scales here. The decision surely would have been the same whether or not the court had acknowledged the university setting of the case. Indeed, the judge who decided this case later suggested the decision to largely omit any discussion of academic freedom was quite deliberate, and distinguished, oddly, between the constitutional academic freedom issues raised by the case and the First Amendment issues it raised.<sup>204</sup> A similar code promulgated by the University of Washington met the same fate, without any mention at all of academic freedom.<sup>205</sup>

By comparison, in *Dambrot v. Central Michigan University*,<sup>206</sup> the Court acknowledged that academic freedom concerns might arise in reviewing a university’s discriminatory harassment policy, but held that the speech in question – racially offensive locker-room talk by a college basketball coach – “served to advance no academic message”<sup>207</sup> and therefore did not “[e]nter the [m]arketplace of [i]deas [o]r the [r]ealm of [a]cademic [f]reedom.”<sup>208</sup> *Dambrot* thus admitted the relevance of academic freedom to its First Amendment inquiry, while narrowing the scope of academic freedom to embrace only classroom speech. Like other courts faced with academic freedom claims, the Sixth Circuit resolved the issue by using First Amendment doctrine that is generally applicable to other public employees.<sup>209</sup>

The speech code cases are thus marked by two distinguishing factors: First, they proceed on the view that standard First Amendment analysis – are the codes content-neutral? Is the university, or some parts of it, a public forum? – may be applied in the context of university speech as it would be applied elsewhere. Second, and relatedly, they pay lip service to academic freedom but

<sup>203</sup> *Doe*, 721 F. Supp. at 863.

<sup>204</sup> Avern Cohn, *A Federal Trial Judge Looks at Academic Freedom*, in *Unfettered Expression: Freedom in American Intellectual Life* 117, 131 (Peggie J. Hollingsworth, ed., 2000) (“[I]n my written decision I used the words *academic freedom* only twice and then obliquely. My concerns were directed to the First Amendment implication of the code in action.”).

<sup>205</sup> *See UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

<sup>206</sup> 55 F.3d 1177 (6th Cir. 1995).

<sup>207</sup> *Id.* at 1190.

<sup>208</sup> *Id.* at 1188.

<sup>209</sup> *See id.* at 1185-86 (discussing application of *Connick v. Myers*, 461 U.S. 138 (1983), and similar cases); *see also Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc) (adopting same approach); Chang, *supra* note \_\_; Rebecca Gose Lynch, Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 Cal. L. Rev. 1061 (2003).



are unwilling to let claims based on academic freedom shift the balance. If hate speech is susceptible to regulation on campus, the university must perforce address the same speech and in the same way as any other public body, and may only reach that speech that would otherwise be properly subject to regulation.<sup>210</sup>

In the heyday of the speech code debate, a number of academics entered the lists in favor of a more permissive approach to the regulation of discriminatory speech on campus.<sup>211</sup> Those advocates argued in part that the law has failed to take adequate account of the harms wreaked by discriminatory speech on its targets – failed, in Mari Matsuda's words, to consider the victim's story.<sup>212</sup> But they argued as well that campus speech codes could be justified on pedagogical grounds. Thus, Mari Matsuda argued that students on campus, young and often far from home for the first time, are especially vulnerable to racist speech, and that universities thus carry a special obligation not to tolerate such conduct.<sup>213</sup>

More centrally to this paper, it has been argued that campus speech codes are appropriate not only because of the vulnerability of students but because they represent the settled judgment of the university that particular kinds of speech do not contribute to its educational mission. A university may reasonably determine that the kind of speech covered by a discrimination policy or other code affecting campus speech is simply not of the intellectual quality demanded in an environment of scholarly inquiry – just as it would not hesitate to conclude that a professor teaching creationism in a biology class may be subject to discipline or dismissal, or that a student pursuing an argument in favor of Holocaust revisionism may receive a failing grade in a history class. When the university concludes, in light of all the circumstances, that “the proscribed speech hurts, more than it promotes, high-quality intellectual debate in a university community,”<sup>214</sup> it may properly take action to restrict that speech.

<sup>210</sup> See Rodney Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, in Van Alstyne ed., *supra* note \_\_, at 196, 224 n.125.

<sup>211</sup> See, e.g., Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343 (1991).

<sup>212</sup> See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in Matsuda et al., *supra* note \_\_, at 17. Chi Steve Kwok has argued that some advocates of affirmative action in university admissions and campus speech codes, such as Matsuda, adopt startlingly divergent assumptions about the vulnerability of students depending on which policy they are addressing. See Chi Steve Kwok, *A Study in Contradiction: A Look at the Conflicting Assumptions Underlying Standard Arguments for Speech Codes and the Diversity Rationale*, 4 U. Pa. J. Const. L. 493 (2002).

<sup>213</sup> See *id.* at 44-45.

<sup>214</sup> Mary Becker, *The Legitimacy of Judicial Review in Speech Cases*, in *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* 208, 211 (Laura Lederer and Richard Delgado, eds., 1995).

Other scholars have taken a slightly more nuanced position, arguing that given the special educational mission of a university, and its duty to protect and encourage the most vulnerable members of the campus community, administrators must be given more discretion to regulate racist speech than might be available to other regulators, but within carefully circumscribed limits. In Kent Greenawalt's terms, universities might restrict speech if they adopted regulations that are both "narrow" in scope and "noncategorical" in nature, treating all vicious remarks similarly rather than discriminating among such remarks on the basis of categories such as race.<sup>215</sup> At the margins, however, as Greenawalt's formulation suggests, it is not clear that these careful approaches are significantly altered by considerations of academic freedom. While they begin by recognizing the special role of the university, they often end with recommendations about the proper scope of campus speech codes that simply track existing categories of First Amendment jurisprudence: narrowness as against vagueness, non-categorical approaches as against content- or viewpoint-specific regulation.

Ultimately, then, the campus speech code debate is fought on different grounds in academic circles and in the courts. The academic debate has turned less on the applicable doctrine than it has on the question of the mission of the university.<sup>216</sup> Is it the unfettered search for truth?<sup>217</sup> If so, it may be difficult (although not impossible) to justify speech codes. Is it the free and robust exchange of ideas, not simply for purposes of truth-seeking but for the democratic education inherent in "allow[ing] students to interact as citizens do in the wider polity?"<sup>218</sup> Then arguments may be made on both sides: speech codes must be prohibited because they obstruct the free exchange of ideas, or they must be permitted because racist speech itself impedes some students' ability and willingness to participate in the broader debate.<sup>219</sup> This debate has been largely beside the point for the courts that have actually decided speech code cases; what has mattered there is simply whether the codes can withstand the strict scrutiny aimed at speech regulation by standard First Amendment doctrine. The universities' attempts to bring a deeper sense of context to the courts' deliberations have been unavailing.

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<sup>215</sup> Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* 76 (1995); for a similar approach, see Cass R. Sunstein, *Democracy and the Problem of Free Speech* 197-204 (1993).

<sup>216</sup> For an example of various contending visions regarding academic freedom and its consequences for campus speech codes, see Hollingsworth, ed., *supra* note \_\_\_\_.

<sup>217</sup> See, e.g., Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J. L. & Educ. 445, 465 (2003); Vince Herron, Note, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. Cal. L. Rev. 407, 434 (1994).

<sup>218</sup> Kwok, *supra* note \_\_\_, at 505; Robert C. Post, *Free Speech and Religion, Racial and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267, 321 (1991).

<sup>219</sup> See, e.g., Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 452.

The reading of *Grutter* I have emphasized above – a reading that places in the foreground the Court's substantial deference, on First Amendment grounds, to the university's right to make "complex educational judgments"<sup>220</sup> in shaping policies to serve its educational mission – would significantly shift the balance of power with respect to speech codes at public universities from the courts back to the schools. This approach respects the fact that there is, finally, no *one* "educational mission." Different universities may properly emphasize different aspects of the academic mission.<sup>221</sup> One school may emphasize pure research and truth-seeking, or believe that learning ought to occur in an unchecked environment of vigorous and even out-of-bounds debate. Another may focus on teaching over research, and come near adopting an *in loco parentis* relationship toward its students. Another may believe in the exchange of ideas subject to a carefully bounded set of civility norms. Surely all of these fall well within what a university may properly view as its educational mission. Indeed, a campus is a large and varied place, and a university or its component faculties may believe that different missions are at the forefront of different sectors of university life.

On all these matters, according to the deference reading of *Grutter*, the courts must remain agnostic. A university may set its own course, and having done so, the courts must respect its considered determination that some set of rules or policies is vital to the fulfillment of that mission. On this view, the courts err when they apply standard First Amendment analysis, without more, to the case of a campus speech code. Those distinctions that a university may choose to draw between different kinds of speech, or different types of offensive speech, are not mere content distinctions; they, too, are a product of the university's "complex educational judgments"<sup>222</sup> and should be respected.

Thus, the gift of *Grutter*'s deference to educational mission is the same with respect to speech codes as it is to admissions policies: the gift of discretion. A university may quite reasonably conclude that a campus speech code is unwarranted, or that it conflicts with its educational mission. But if its vision of its educational mission would be served by imposing restrictions on campus speech, it ought to have wide latitude to do so. In each case, the determination rests with the school. If a university enforces a speech code upon careful professional judgment about its own desired ends, "the state is powerless to interfere."<sup>223</sup>

<sup>220</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>221</sup> See Greenawalt, *supra* note \_\_\_, at 74.

<sup>222</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>223</sup> Peter J. Byrne, *Racial Insults and Free Speech Within the University*, 79 Geo. L.J. 399, 425 (1991). Byrne limits his recommendation to cases in which the university "acts to safeguard liberal education, which is understood both as the disinterested pursuit of truth according to disciplinary criteria and the elaboration and instruction in culture." *Id.* That analysis assumes that prohibitions of racist speech on campus are only justified when they serve the particular functions of a university, which Byrne is concerned to identify. Because this section assumes that the

The few courts that have examined campus speech codes have arguably fallen into error by assuming that academic freedom concerns do not alter the need to perform the traditional First Amendment analysis that would be performed in other speech contexts. Under *Grutter's* First Amendment, their task would be quite different: (1) to look for evidence that the university's restrictions on speech were justified by reference to its educational mission; (2) to look for evidence that the restrictions were the product of a genuinely "academic" decision-making process; and (3) given a finding that the university met conditions (1) and (2), to accord wide latitude to the nature and scope of the measures adopted by the university. In that inquiry, the courts must assume the university's good faith absent contrary evidence.<sup>224</sup>

In short, the elaborate architecture of First Amendment jurisprudence – its inquiries about whether a public forum is present and what kind of forum, its effort to smoke out content and viewpoint distinctions – must take a back seat to a deferential, context-specific inquiry into whether a university's speech code relates to its educational mission. Under this test, it is quite conceivable that the courts would uphold restrictions on campus speech.

Interestingly, in his concurrence in the *Southworth* case,<sup>225</sup> Justice Souter (joined by Justices Stevens and Breyer) recognized that a strong institutional autonomy approach to university policies affecting student speech might carry precisely this implication.<sup>226</sup> As he recognized, an institutional autonomy approach like that suggested by Justice Frankfurter in *Sweezy* "might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission."<sup>227</sup> For that very reason, Justice Souter was at pains to emphasize the limited nature of the Court's prior academic freedom jurisprudence and the fact that *Southworth* interposed student First Amendment rights as against the university's First Amendment right to institutional autonomy. "It is enough to say," he concluded, "that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees."<sup>228</sup>

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*Grutter* Court privileged deference to academic institutions generally over any particular vision of the university, it need not accept that aspect of Byrne's argument. It does, however, play a more significant role in the next section of this paper.

<sup>224</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>225</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

<sup>226</sup> *Id.* at 239 n.5 (Souter, J., concurring in the judgment) ("Indeed, acceptance of the most general statement of academic freedom (as in the South African manifesto quoted by Justice Frankfurter [in his *Sweezy* concurrence]) might be thought even to sanction student speech codes in public universities.").

<sup>227</sup> *Id.* at 237.

<sup>228</sup> *Id.* at 239.

However limited his conclusions about the status of institutional autonomy as a First Amendment right of universities may have been, though, Justice Souter at least acknowledged that this approach may indeed support a university's right to restrict student speech on campus. That is the approach taken by the majority in *Grutter* – a majority that included Justices Souter, Stevens, and Breyer.

Ultimately, I take no position on whether such codes are wise.<sup>229</sup> The question here is simply whether they are *permissible*. Under *Grutter*'s First Amendment, as long as the wisdom of campus speech restrictions is left in the university's hands, the court need not conduct the same searching inquiry into constitutionality. Thus, *Grutter*'s First Amendment may well support the imposition of speech codes on campus.

## 2. Content Distinctions On Campus, With Special Attention to Religious Speech

Universities have become a prime ground of contention in the Court's ongoing effort to police permissible and impermissible regulation of religious speech and activity in the public sphere. In recent years, some of the Court's most important pronouncements on the boundaries of acceptable government support for or regulation of religion under the Establishment Clause have taken place in the context of the university.<sup>230</sup> Here, too, *Grutter* may suggest a different approach.

Debates over the inclusion of religious speech in campus life have centered on a simple conflict. On the one hand, it is argued, public institutions must comply with the absolute prohibition on certain kinds of state support for religion indicated by the language of the Establishment Clause and the separationist approach of the Warren-era Supreme Court. On the other, the Court and various advocates before it have increasingly turned to a speech-oriented model in evaluating public religious conduct.

*Widmar v. Vincent* illustrates this conflict. There, a student religious group challenged a decision of the University of Missouri at Kansas City prohibiting it from meeting on university grounds "for purposes of religious worship or religious teaching."<sup>231</sup> The university argued that the restriction was necessary to comply with the Establishment Clause.<sup>232</sup> The Court was unanimous in agreeing that the university was not *required* to restrict religious speech on

<sup>229</sup> See Greenawalt, *supra* note \_\_, at 72 (noting that the constitutionality and the wisdom of university speech regulations present two different questions).

<sup>230</sup> See, e.g., *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1982).

<sup>231</sup> *Widmar*, 454 U.S. at 265-66 (quotation and citation omitted).

<sup>232</sup> *Id.* at 275.

campus. But it fractured on the question of whether the university *could* restrict the speech.

For the majority, Justice Powell – the author of the pivotal *Bakke* opinion, it should be noted – assumed that the proper course of analysis was through public forum doctrine. Because the university had created a forum for the activities of varied student groups, it was not entitled to discriminate among those groups based on the content of their speech.<sup>233</sup> On this point, the Court's analysis was rather thin; any consideration of whether the university had truly engaged in content discrimination, or whether the case actually involved some form of viewpoint discrimination,<sup>234</sup> would receive more careful consideration in *Rosenberger*.

The Court did acknowledge that a university is not, in all respects, the same as a traditional public forum, and suggested that the decision did not question a university's "authority to impose reasonable regulations compatible with [its educational] mission upon the use of campus and facilities."<sup>235</sup> At the same time, it asserted that persons entitled to be on campus, including students, enjoy the usual array of First Amendment rights.<sup>236</sup>

In rejecting any special right of the university to exclude the religious speech at issue, moreover, Justice Powell turned to a significant use of the Court's own prior academic freedom jurisprudence. Because the university "is peculiarly the marketplace of ideas," he suggested, it was under a particular obligation not to discriminate among the speakers in that "marketplace."<sup>237</sup> Of course, that phrase found its way into the academic freedom jurisprudence in *Keyishian*. In *Bakke*, Justice Powell had quoted that case (carefully omitting the sentence containing that phrase) for the proposition that a university may select for diversity when choosing its students.<sup>238</sup> The marketplace of ideas metaphor thus *supported* the university's discretion in *Bakke*. Here, the same phrase served to *narrow* that discretion. Thus, despite its mention of academic freedom and its suggestion that universities might enjoy some breathing room in the grant of access to university facilities, *Widmar* again proceeded on a standard First Amendment analysis basis that rendered any constitutional principle of academic freedom irrelevant.

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<sup>233</sup> See *id.* at 267-70.

<sup>234</sup> See *id.* at 284 n.2 (White, J., dissenting).

<sup>235</sup> *Id.* at 268 n.5; see also *id.* at 276 ("Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.") (quotations and citations omitted).

<sup>236</sup> *Id.* at 268-69.

<sup>237</sup> *Id.* at 268 n.5 (quotation and citation omitted).

<sup>238</sup> See *Bakke*, 438 U.S. at 312.

The Court took a similar approach in *Rosenberger*. There, again, the case turned on the workings of public forum doctrine and the requirements of content and viewpoint neutrality, not on the University of Virginia's unique status as a university. Thus, in asserting that "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them,"<sup>239</sup> the Court seemed to assume that any constitutional test that would apply to state action applied in precisely the same way to a public educational institution.<sup>240</sup>

Indeed, to the extent the university's status as an educational institution weighed in the balance, it was *against* its discretion to regulate viewpoints on campus. As with *Widmar*, the Court treated the university's status as a locus of "thought and experiment that is at the center of our intellectual and philosophic tradition"<sup>241</sup> as a *constraint* on its discretion, rather than a basis for according it autonomous status under the law. As for *Widmar*'s statement that a university might be entitled to greater leeway in "mak[ing] academic judgments as to how best to allocate scarce resources,"<sup>242</sup> the Court effectively cut back sharply on this apparent grant of discretion, labeling it no more than a lame recognition that a university may "determine[ ] the content of the education it provides."<sup>243</sup>

Three relevant conclusions may be drawn from these cases. First, where conflicts arise between student speech on campus and the university's own efforts to direct or limit that speech, the Court is inclined to turn to standard First Amendment tests in resolving those conflicts.<sup>244</sup> Second, as a corollary to the first conclusion, claims of constitutional academic freedom will buy universities little additional discretion. Third, to the extent academic freedom is involved in these cases, the majority of the Court has treated it as an additional obligation to follow rules of content- and viewpoint-neutrality, rather than as a grant of discretion to shape and channel the content of on-campus speech more freely.

*Grutter*'s First Amendment might approach these cases quite differently. Perhaps because they believe these conflicts are best dealt with under the rubric of the Establishment Clause, or perhaps because of their recognition that the courts will ultimately treat these cases according to established First Amendment jurisprudence, universities have not argued that they are entitled to regulate religious speech on campus in service of their educational mission. No doubt many universities quite properly believe that since their educational mission

<sup>239</sup> *Rosenberger*, 515 U.S. at \_\_\_\_.

<sup>240</sup> See also *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000).

<sup>241</sup> *Id.* at \_\_\_\_.

<sup>242</sup> *Widmar*, 454 U.S. at 278.

<sup>243</sup> *Rosenberger*, 515 U.S. at \_\_\_\_.

<sup>244</sup> See also *Southworth*, 529 U.S. at 233 (proper protection of students' First Amendment interests requires application of viewpoint neutrality rule where university allocates funding support to student groups).

includes the provision of access to a wide variety of forms of student speech in order to encourage a vibrant pluralism of religious and other views on campus, such an argument would actually contradict their own idea of a university.<sup>245</sup> Accordingly, they may believe, if there is any basis for treating religious speech differently, it must come from the Establishment Clause.

But such an argument is hardly inconceivable. Even leaving aside strong-form arguments in favor of a strictly secular campus, a plausible weak-form argument could be made in favor of some careful restrictions on campus religious speech. For example, a university might argue that campus speech should be directed toward the creation of spaces in which students can engage in productive dialogue and debate. Many religious organizations and activities may provide opportunities for that kind of dialogue; indeed, even some forms of religious teaching may provide that kind of productive exchange of ideas. But religious *worship* is not, at least in some traditions, an opportunity for dialogue. It is rather a communal experience that assumes a group of like-minded individuals and may (again, in some traditions only) exclude non-believers. Even if this is too harsh a view, a university may simply make the considered judgment that worship services, however meaningful and valuable, are far from the core educational mission of a modern public university.

I would hesitate long before suggesting that such an argument would succeed, even under the *Grutter* vision of substantial deference to a university's academic judgments. But it must at least be clear that a court applying *Grutter*'s deferential approach would differ considerably in its view of the same case than one applying traditional First Amendment standards. First Amendment scrutiny of speech allocation decisions in a public forum is highly exacting, and begins from the assumption that all speech that is not distinguishable on time, place, and manner grounds is equally valuable and equally entitled to share in the use of the commons. By contrast, a court starting from the position of *Grutter* deference to an educational institution assumes that the most important factor is the university's own evaluation of the value of particular forms of speech within the college gates.

Under this approach, provided that a university can make a colorable claim that its policy is the result of a considered academic judgment, the court must treat that judgment with something less than the exacting scrutiny usually demanded under the First Amendment. Something of the flavor of this approach is evident in Justice Stevens's concurrence in *Widmar*. There, he suggested that "the use of the terms 'compelling state interest' and 'public forum' to analyze the question presented in this case may needlessly undermine the academic freedom

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<sup>245</sup> Cf. *id.* at 233 ("The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.").



of public universities.”<sup>246</sup> He would thus have held that a university may limit access to speech within the college gates to a greater extent than the administrator of other public forums, provided it can supply a valid reason for the limitation.<sup>247</sup>

Because the only reason put forward by the University of Missouri in that case was its “fear of violating the Establishment Clause,”<sup>248</sup> Justice Stevens concurred in the Court’s judgment. But his approach, which refuses to “encumber[ ]” universities “with ambiguous phrases like ‘compelling state interest,’”<sup>249</sup> plainly would give greater scope to universities to move beyond an Establishment Clause rationale and advance other, more academically grounded reasons for imposing restrictions on certain forms of religious speech, and would subject those reasons to a far more forgiving level of scrutiny.

Thus, if read seriously, *Grutter*’s emphasis on the importance of deferring to the academic judgments of universities would compel a different approach to the question of religious speech on campus. Because restrictions on religious speech commonly raise non-academic arguments such as a concern about violating the Establishment Clause, it is not clear that the results of such disputes would differ significantly. But this approach would still be significant if only for its assumption that universities are *not* obliged to treat all forms of speech the same, that they are not subject to the same kinds of scrutiny that may apply to other administrators of what may be characterized as public forums. If a university *could* advance a plausible academic argument in favor of any restrictions on particular forms of religious speech, *Grutter*’s First Amendment would place a good deal of weight on that argument.

### 3. The Solomon Amendment

Under the bylaws of the American Association of Law Schools, every member school is bound to a policy of equal opportunity in employment, including equal treatment without regard to sexual orientation.<sup>250</sup> Schools are expected to limit the use of their facilities in recruitment or placement assistance to those employers who are willing to abide by these principles of equal opportunity.<sup>251</sup> One potential employer is the United States military, which discriminates against gays and lesbians.<sup>252</sup> Because of its policies, the military

<sup>246</sup> *Widmar*, 454 U.S. at 277-78 (Stevens, J., concurring).

<sup>247</sup> *See id.* at 280.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 279.

<sup>250</sup> AALS Bylaw § 6.4(b). Separate principles apply to religiously affiliated law schools. *See* AALS Interpretive Principles, [cite].

<sup>251</sup> *See id.* § 6.19.

<sup>252</sup> *See* 10 U.S.C. § 654 (mandating discharge of members of the armed forces who engage in “homosexual acts”).

has been the subject of various protests, limitations, and outright restrictions on its ability to recruit law students on campus.<sup>253</sup>

Congress responded to this state of affairs in 1994 by passing the so-called Solomon Amendment.<sup>254</sup> Under that statutory provision, a university or its “subelement,” such as a law school, may not prohibit or prevent the government from recruiting students on campus, or restrict the government’s access to student information for recruiting purposes.<sup>255</sup> Failure to comply with this provision carries with it significant funding consequences, for both the law school and the university. A law school’s non-compliance may result in the government withdrawing all Defense Department funding from the university as a whole, and a significant portion of non-defense government funding from the law school itself.<sup>256</sup>

Since the passage of the Solomon Amendment, law schools have attempted by a variety of means to reconcile their non-discriminatory policies with the terms of the Amendment.<sup>257</sup> In recent years, however, the government has become increasingly strict in its interpretation of the Amendment. As a result, law schools have effectively suspended their non-discrimination policies with respect to military recruitment.<sup>258</sup>

Recently, a number of different groups of plaintiffs brought suit to challenge the government’s enforcement of the Solomon Amendment.<sup>259</sup> The

<sup>253</sup> See, e.g., *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, Civ. A. No. 03-4433(JCL), -- F. Supp. 2d --, 2003 WL 22708576, at \_\_ (D.N.J. Nov. 5, 2003) (hereinafter *FAIR*).

<sup>254</sup> For commentary, see, e.g., Peter H. Schuck, *Equal Opportunity Recruiting*, Am. Law., Jan. 2004, at 57; Amy Kapczynski, Note, *Queer Brinksmanship: Citizenship and the Solomon Wars*, 112 Yale L.J. 673 (2002); Sylvia Law, *Civil Rights Under Attack by the Military*, 7 Wash. U. J.L. & Pol’y 117 (2001); W. Kent Davis, *Swords Into Ploughshares: The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 Val. U. L. Rev. 61, 105-07 (1998); Francisco Valdes, *Solomon’s Shames: Law as Might and Inequality*, 23 T. Marshall L. Rev. 351 (1998).

<sup>255</sup> See 10 U.S.C. § 983(b).

<sup>256</sup> See *FAIR*, -- F. Supp. 2d at \_\_ (discussing current state of Solomon Amendment and its implementing regulations). A recent bill passed by the House of Representatives reinforces this legal regime by stating clearly that military recruiters must be granted the same access to students that other employers receive and adding to the list of agencies that may withhold funding for noncompliant schools. See H.R. 3966 (approved by House on March 30, 2004).

<sup>257</sup> See Law, *supra* note \_\_, at 123-29. Chai Feldblum and Michael Boucai of Georgetown University Law Center have published a handbook for law schools seeking to “ameliorate” the perceived conflict between law schools’ non-discrimination policies and their obligations under the Solomon Amendment. See Chai Rachel Feldblum and Michael Boucai, *Due Justice: Amelioration for Law School Compliance with the Solomon Amendment: A Handbook for Law Schools* (2003), available at [www.law.georgetown.edu/solomon/documents/handbook.pdf](http://www.law.georgetown.edu/solomon/documents/handbook.pdf).

<sup>258</sup> See *FAIR*, *supra* note \_\_, at \_\_.

<sup>259</sup> See Complaint, *Forum for Academic and Institutional Rights v. Rumsfeld*, Civ. A. No. 03-4433 (D.N.J.) (hereinafter *FAIR* Complaint); Complaint, *Burt et al. v. Rumsfeld*, Civ. A. No. \_\_

complaints brought by these plaintiffs, who include a variety of law professors, law students, and student and professional groups, raise a number of statutory and constitutional claims, including First Amendment, due process, and equal protection objections to the enforcement of the Amendment. Most of those arguments sound in standard First Amendment terms: the Amendment constitutes a form of viewpoint or content discrimination, is void for vagueness, violates the plaintiffs' First Amendment association rights, and so forth.<sup>260</sup> Not surprisingly, all of the plaintiffs have also argued that the Solomon Amendment violates their academic freedom.<sup>261</sup> For the most part, these arguments are barely fleshed out in the complaints and appear to be mere supplements to the other arguments.<sup>262</sup>

One set of plaintiffs, however, has advanced an academic freedom argument that clearly contemplates the influence that *Grutter's* First Amendment discussion may have in the Solomon Amendment litigation. The Forum for Academic and Institutional Rights ("FAIR"), a recently formed, largely anonymous "association of law schools and other academic institutions,"<sup>263</sup> has suggested that "*Grutter* supports the idea that universities should be free to define their own concepts of discrimination, . . . and that law schools have a powerful interest in placement policies that avoid invidious discrimination."<sup>264</sup> Its complaint is replete with language about law schools' educational missions, the "pedagogical value" of the schools' policy regarding on-campus recruiters, which "pronounc[es] values that students do not necessarily learn from casebooks and lectures," and the schools' interest in "nurtur[ing] the sort of environment for free and open discourse that is the hallmark of the academy."<sup>265</sup> Unlike the plaintiffs

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(D. Conn.) (hereinafter *Burt* Complaint); Complaint, *Burbank et al. v. Rumsfeld*, Civ. A. No. \_\_\_\_ (E.D. Pa.) (hereinafter *Burbank* Complaint); Complaint, *Student Members of SAME (Student/Faculty Alliance for Military Equality) et al. v. Rumsfeld*, Civ. A. No. 3:03CV01867 (D. Conn.) (hereinafter *SAME* Complaint).

<sup>260</sup> See, e.g., *FAIR* Complaint ¶¶ 45-47, 51-53; *Burt* Complaint ¶¶ 36-47; *Burbank* Complaint ¶ 39.

<sup>261</sup> See, e.g., *FAIR* Complaint ¶ 44; *Burt* Complaint ¶ 33; *Burbank* Complaint ¶ 37.

<sup>262</sup> The student plaintiffs in the *SAME* case, who are members of student groups at Yale Law School, do not mention academic freedom in express terms in their complaint at all. They do, however, raise the argument at least tangentially in their opposition to the government's motion to dismiss. See Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *SAME v. Rumsfeld*, Civ. A. No. 3:03CV1867, at 10-11 (filed Feb. 20, 2004) (citing *Grutter*, *supra* note \_\_\_, and *Shelton v. Tucker*, 364 U.S. 479 (1960), in support of the proposition that plaintiffs' asserted right to receive information under the First Amendment is especially crucial in the university context).

<sup>263</sup> See Forum for Academic and Institutional Rights, *Questions & Answers About the Solomon Amendment Litigation* 11, available at \_\_\_\_ (hereinafter *Questions and Answers*).

<sup>264</sup> *Id.* at 5; see also *id.* at 8 ("Our claim is that law schools are entitled to define their institutional values, at least insofar as those self-definitions do not violate rights specifically protected by the constitution.").

<sup>265</sup> *FAIR* Complaint ¶¶ 23-25. Notwithstanding its reference to "free and open discourse," the plaintiffs' arguments in the *FAIR* litigation would also appear to support the imposition of speech restrictions on law school campuses. Indeed, the complaint revealingly illustrates the

in the other Solomon Amendment lawsuits, FAIR and its fellow plaintiffs have made academic freedom “the principal basis of the[ir] legal challenge.”<sup>266</sup>

In a recent decision, the district court in the *FAIR* litigation rejected that position, at least as an initial matter. In *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, Judge Lifland of the District of New Jersey denied plaintiffs’ motion for a preliminary injunction enjoining enforcement of the Amendment, holding that plaintiffs had standing to bring their claims (a point I discuss below), but had failed to show a likelihood of success on their constitutional claims.<sup>267</sup> The court acknowledged that *Grutter* required courts to defer to academic decisions made by universities, but suggested that the fact that “such institutions occupy ‘a special niche in our constitutional tradition’ implies that they remain part of, and not sovereign to, that constitutional tradition.”<sup>268</sup> Here, the court made clear, any academic freedom interests asserted by the plaintiffs failed in the balance against the asserted interests of the government itself.

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conflict between a view of academic freedom that believes on-campus discourse should be free and unfettered and one that emphasizes the need to restrict on-campus speech to ensure civility and prevent the silencing of disfavored groups. See *id.* ¶ 20 (“Diversity serves no purpose if students and faculty feel inhibited from engaging in discourse. Thus, law schools have promoted, demanded, and strictly enforced, not merely diversity, but also tolerance and respect.”).

Feldblum and Boucai’s handbook offering ways for law schools to “ameliorate” their compliance with the Solomon Amendment strikes a similar note of perhaps unintended irony. Thus, on the one hand, the authors allow that “one should expect a range of views on the part of faculty, students and staff regarding the acceptability of homosexuality,” let alone the Solomon Amendment itself. Feldblum and Boucai, *supra* note \_\_, at 8. On the other, they make clear their view that discussion of these issues in the context of “amelioration” activities such as teach-ins should be anything but free and open, on the basis that the mere fact that military recruiters are present on campus is sufficient to represent the view that “the service of openly gay individuals is destructive to the military.” *Id.* at 11. Accordingly, they would permit, if not quietly encourage, ignoring supporters of the Solomon Amendment even within teach-ins and other educational programming. See, e.g., *id.* at 11 (“[A] law school can legitimately choose not to include any panelists supporting the military’s policy in the [educational] program”), 12 (“Law schools . . . need not feel they must expend excessive energy to find [individuals who support the Solomon Amendment or military policy with respect to gays and lesbians] in order to have a ‘balanced’ program”), 13-16 (advocating various means of supporting groups and activities on one side of the debate only). The handbook evinces little recognition that some students or faculty might oppose the government’s policy on gays in the military *and* support on-campus military recruiting.

<sup>266</sup> *Questions and Answers*, *supra* note \_\_, at 1. That is not to say that the other plaintiffs have ignored academic freedom generally or *Grutter* specifically. Their arguments, too, are replete with references to both the general principle of academic freedom and *Grutter*. But the *FAIR* case represents perhaps the most fully fleshed out version of the argument from *Grutter* and academic freedom.

<sup>267</sup> The plaintiffs appealed the ruling, and the Third Circuit heard oral argument in the case on June 30, 2004.

<sup>268</sup> *FAIR*, -- F. Supp. 2d at \_\_ (quoting *Grutter*, 123 S. Ct. at 2339).

More interesting was another aspect of the court's decision: its conclusion that "[t]he concept of academic freedom seems to be inseparable from the related speech and associational rights that attach to any expressive association or entity."<sup>269</sup> In other words, "the right to academic freedom is not cognizable without a foundational free speech or associational right."<sup>270</sup> The court effectively concluded that because academic freedom is a "First Amendment interest,"<sup>271</sup> and because the Solomon Amendment did not directly interfere with any speech act on the part of individual speakers, such as professors, any academic freedom claim in the case would have to arise from and be parasitic on some independent First Amendment violation.<sup>272</sup> Because the court found no such violations here, any academic freedom claim would necessarily fail.<sup>273</sup>

I want to suggest here that the district court in *FAIR* erred in three important respects. First, it failed to give sufficient recognition to *Grutter*'s principle of substantial deference to decision making by higher educational institutions. Although it accurately quoted *Grutter* as speaking in terms of "a degree of deference,"<sup>274</sup> it gave short shrift to the real degree of deference accorded there. Given the Supreme Court's treatment of the University of Michigan Law School's program in that case, *Grutter* can only be fairly read as according *substantial* deference to university decisions. As Peter Schuck has quite properly noted, the Court's "latitudinarian" treatment of the Law School's admissions policy is truly striking, particularly when contrasted with the Court's normal brand of Fourteenth Amendment strict scrutiny.<sup>275</sup> That treatment is best read as suggesting that university decisions are, under the First Amendment, substantially insulated from the normal processes of judicial review.

Nor is it a sufficient rejoinder to suggest that universities "remain part of, and not sovereign to," the Constitution and its limitations.<sup>276</sup> If *Grutter*'s gentle treatment of the Law School's program means anything, it surely means that "constitutionally prescribed limits"<sup>277</sup> are themselves fluid and context-dependent. They are, in Robert Post's terms, the product of a continuous negotiation between internal constitutional law and external cultural norms.<sup>278</sup> Thus, as I have argued, *Grutter* suggests that within the bounds of institutional autonomy provided by the

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<sup>269</sup> *Id.* at \_\_\_\_.

<sup>270</sup> *Id.* at \_\_\_\_.

<sup>271</sup> *Id.* at \_\_\_\_.

<sup>272</sup> *See id.* at \_\_\_\_ ("If the Solomon Amendment violates Plaintiffs' right to academic freedom, it is because it also intrudes on their rights to free speech and expressive association.").

<sup>273</sup> *See id.* at \_\_\_\_.

<sup>274</sup> *Id.* at \_\_\_\_ (quoting *Grutter*, 123 S. Ct. at 2339).

<sup>275</sup> *See* Schuck, *supra* note \_\_\_\_.

<sup>276</sup> *Id.* at \_\_\_\_.

<sup>277</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>278</sup> *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 8-9 (2003).

First Amendment, universities enjoy substantial freedom to experiment with policies that serve their educational missions. Within those boundaries, they are free at least to flirt with, and even bend, traditional constitutional limits.<sup>279</sup> Indeed, the product of those experiments itself will go a long way toward defining the boundaries of constitutional conduct, at least in that specific context.

In short, it was not enough for the district court in *FAIR* to simply state that universities are “not impervious to competing societal interests.”<sup>280</sup> The point of *Grutter*'s First Amendment is that universities have substantial freedom to negotiate between those interests, and the balance they strike should generally be respected as the product of “complex educational judgments in an area that lies primarily within the expertise of the university.”<sup>281</sup>

The court erred, too, by suggesting that academic freedom claims must be grounded on “foundational free speech or associational right[s]” to be sustainable.<sup>282</sup> Unless the university's right to select those who shall be admitted to study, which has been recognized since Justice Frankfurter's concurrence in *Sweezy*, is conceived of as a species of associational right, *Bakke* and *Grutter* themselves involved no foundational speech or association claims; and conceiving of admissions decisions as associational rights simply does not capture what was going on in those cases. Although the academic freedom arguments in those cases arose as defenses rather than as claims for relief, *Grutter*'s vehement discussion of the vital First Amendment role of universities does not suggest that academic freedom is a shield only, and not a sword. Rather, *Grutter*'s First Amendment recognizes that universities play a special role in the First Amendment firmament, and must be granted discretion to design and implement a broad range of educational policies, whether conceived as direct speech acts or as decisions that shape the structure and composition of universities as a whole.

I do not mean to suggest that the court was therefore wrong in denying *FAIR*'s motion for a preliminary injunction, or that *FAIR* ought to prevail at trial. Constitutional limits still exist. In this case, the court might properly conclude that *FAIR*'s lawsuit looked less like the internal admissions policy at issue in *Grutter* and more like the unsuccessful privilege claim in the *EEOC* case – a positive claim for something more than “the protect[ion] [of] the normal decision-making processes of educational institutions.”<sup>283</sup> Certainly the unique context of the case, in which *FAIR* challenged the law schools' obligation to abide by the terms of their public funding, offers a complicating factor that was not present in *Grutter*. Even on this point, however, the Supreme Court has suggested in dicta

<sup>279</sup> For expansion on this point, see *infra* Part IV.

<sup>280</sup> *FAIR*, -- F. Supp. 2d at \_\_\_\_.

<sup>281</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>282</sup> *FAIR*, -- F. Supp. 2d at \_\_\_\_.

<sup>283</sup> Yudof, *supra* note \_\_\_, at 856.

that universities may occupy a more privileged position than other actors when they accept government funding that carries conditions that may affect academic freedom.<sup>284</sup>

Nevertheless, the district court's decision notwithstanding, *Grutter* does suggest that university and/or law school plaintiffs in litigation against the Solomon Amendment ought to be granted substantial deference to structure their academic policies – including their decisions about on-campus access to employment recruiters – in order to suit their educational missions. Whether or not that institutional autonomy ought to overcome the substantial interests of the government in maintaining access to potential recruits is another question. Surely, however, if institutional autonomy is enough to support university admissions policies that fall under the Court's strict scrutiny, it ought at least to weigh heavily in the balance against the government's asserted interests in this context.

I have as yet barely touched on the third potential error in the district court's decision in the *FAIR* litigation. The court suggested that *all* of the plaintiffs in this case – *FAIR*, “an association of law schools and law faculties”;<sup>285</sup> the Society of American Law Teachers; two law professors; three law students; and two law student groups – had standing to pursue their claims against the government.<sup>286</sup> The court based its conclusion on the view that the individual plaintiffs and associations enjoyed First Amendment rights as “beneficiaries, senders, and recipients of the message of non-discrimination sent by their schools’ non-discrimination policies.”<sup>287</sup>

That conclusion suggests, consistently with the Court's pre-*Grutter* academic freedom jurisprudence, that members of the university community enjoy a substantial degree of First Amendment freedom on campus, notwithstanding the institutional setting.<sup>288</sup> But *Grutter* itself sounds in

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<sup>284</sup> Thus, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court did suggest that government funding could not overcome *all* First Amendment claims on the part of the recipient of funds. In particular, it noted that “the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.” *Id.* at 200. But that dicta only suggests that specific vagueness and overbreadth arguments, which were made and rejected in *FAIR*, might prevail in a government funding context. It did not suggest that a free-standing claim of academic freedom would necessarily prevail in any contest with the government over the terms of public funding for universities.

<sup>285</sup> *FAIR*, -- F. Supp. 2d at \_\_\_\_.

<sup>286</sup> *See id.* at \_\_\_\_.

<sup>287</sup> *Id.* at \_\_\_\_.

<sup>288</sup> *See, e.g., Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, \_\_\_\_ (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

institutional terms. The freedom described there is not a right of professors to enjoy the communicative benefits of a diverse student body, but the discretion of an educational *institution* to set educational policies and make academic decisions – to fulfill a “proper *institutional* mission.”<sup>289</sup>

Thus, one fair reading of *Grutter* suggests that academic freedom is a fundamentally institutional right, not one enjoyed by university faculty. At the very least, it suggests that “educational autonomy”<sup>290</sup> is an institutional right, not an individual right, and may therefore only be invoked by the institution itself.<sup>291</sup> That conclusion is fortified in a case like the Solomon Amendment litigation. For whatever the position of the *institutions* involved may be with respect to the Solomon Amendment, it is far from clear that the individuals and groups *within* those institutions agree on the propriety or impropriety of on-campus military recruitment. Thus, under the cover of academic institutional autonomy, we may face a situation in which *some* students and professors are acting to alter the educational policy of their institutions without apparent regard to the official policies of the institution itself, let alone the views of any professors or students who *want* the military to recruit on campus.<sup>292</sup>

Because the plaintiffs in *FAIR* apparently included at least two law schools, the academic freedom claims could still proceed even if they could only be invoked by educational institutions.<sup>293</sup> But this reading of *Grutter* does

<sup>289</sup> *Grutter*, 123 S. Ct. at 2339 (emphasis added).

<sup>290</sup> *Id.*

<sup>291</sup> *Cf. Urofsky*, 216 F.3d at 412 (“Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.”). That conclusion might be more apt in cases like *Grutter* and the Solomon Amendment litigation, which involve educational policies set by the institution as a whole, than in *Urofsky* itself, which involved limitations on information-gathering activities by professors themselves. For commentary on the standing issues raised by *Urofsky*, see Alvin J. Schilling and R. Craig Wood, *The Internet and Academic Freedom: The Implications of Urofsky v. Gilmore Standing as a Constitutional Concern: A Required Threshold Issue*, 179 West’s Educ. L. Rep. 9 (2003); Kate Williams, Note, *Loss of Academic Freedom on the Internet: The Fourth Circuit’s Decision in Urofsky v. Gilmore*, 21 Rev. Litig. 493, 507 (2002).

<sup>292</sup> For example, a number of law student groups comprised of service members, reservists, veterans, and non-veterans filed a brief *amicus curiae* in the Third Circuit in the *FAIR* litigation, arguing that the exclusion of the military from on-campus recruiting would “undercut their ability to participate meaningfully in the classrooms and halls of American law schools.” Brief of the UCLaw Veterans Society *et al.* as *Amici Curiae* in Support of Appellees, *FAIR v. Rumsfeld*, No. 03-4433 (3d Cir.), filed Feb. 24, 2004.

<sup>293</sup> See *FAIR*, -- F. Supp. 2d at \_\_ (noting that second amended complaint identified two law schools as members of FAIR, and that two more law schools had informed the court by letter that they were also members of the association). The decision says nothing about the nature of those law schools’ commitment – whether they represented the decision of the faculty as a whole, or of the law school itself, whether that decision was authorized in turn by the governing body of the university, and so forth.



suggest that most of the plaintiffs in the *FAIR* litigation – the non-law-school members of FAIR, the Society of American Law Teachers, the individual professors and students, and the student groups – might lack standing to pursue any institutionally based academic freedom claims. Moreover, because the *Burt* and *Burbank* lawsuits are brought only by law professors and law students, and not the law schools themselves, this reading of *Grutter* suggests that any academic freedom claims in those cases – at least, any academic freedom claims grounded on institutional autonomy rather than on some individual's right to speak or receive information – also must be dismissed.

In sum, the institutional autonomy-based reading of *Grutter* offers real ammunition for law schools that wish to challenge the enforcement of the Solomon Amendment. Law schools' policies of non-discrimination, and their efforts to enforce those policies in a variety of settings, including on-campus recruitment, represent considered academic judgments that are entitled to substantial deference, notwithstanding any contrary government interests in maintaining an on-campus presence for military recruitment. But just as those judgments are properly within the bailiwick of the law schools as academic *institutions*, so any institutional autonomy-based arguments against the Solomon Amendment must be invoked by the institutions themselves, not individual professors or students or their representatives. *Grutter's* First Amendment thus demands a searching look at the fitness of many of the parties to the Solomon Amendment lawsuits, even as it also suggests that those lawsuits may have added merit as a result of *Grutter*.

#### 4. The Academic Bill of Rights

Assume for a second that the justifications for academic freedom discussed above are correct – that academic freedom is justified because of its contribution to the search for truth, or because of its contribution to a truly democratic education and, by extension, a truly democratic polity.<sup>294</sup> Further assume for a moment that these are the values that undergird the Court's decision in *Grutter*. What, then, could be wrong with legislation that enshrines these values in the law? What could be wrong with legislation that purports to *support* academic freedom as I have described it?

That question is raised by recent efforts, in Congress and in the states, to champion legislation called the Academic Bill of Rights. Drafted by conservative commentator David Horowitz and backed by his and other groups, the document states, in part, that decisions concerning the hiring, firing, tenure, or promotion of faculty, students' grades, curriculum decisions and other aspects of university life should not be made "on the basis of . . . political or religious beliefs."<sup>295</sup> The

<sup>294</sup> See *supra* notes \_\_-\_\_ and accompanying text.

<sup>295</sup> *Academic Bill of Rights*, available at [www.studentsforacademicfreedom.org](http://www.studentsforacademicfreedom.org).

Academic Bill of Rights is grounded on views that most readers of this article will likely support: that the university serves "the pursuit of truth," that "pluralism, diversity, opportunity, critical intelligence, openness and fairness" are "the cornerstones of American society," that academic freedom serves to "secure the intellectual independence of faculty and students and to protect the principle of intellectual diversity."<sup>296</sup>

In short, if taken at face value, the Academic Bill of Rights ought to be largely uncontroversial to those who adopt conventional views of academic freedom. It should be no more objectionable, say, than a law that declares that universities must guarantee and support the presence of a diversity of views on campus.

Whether it need be taken on its face is quite a different question. Horowitz and his supporters are, by and large, political conservatives, and since their evident concern is the perception that the university has been colonized and made the almost exclusive preserve of political liberals, the Academic Bill of Rights could be viewed simply as a device to force the hiring of greater numbers of conservative academics and nothing more.<sup>297</sup> But if, as Horowitz and his supporters contend, conservatives are not only underrepresented on campus, but are underrepresented as a result of active and deliberate choices stemming from political bias, what is wrong with redressing the imbalance?

Although Horowitz disclaims any desire to see the Academic Bill of Rights enacted as binding law,<sup>298</sup> it has been the subject of a number of legislative developments. A version of the Academic Bill of Rights has been introduced as a non-binding resolution in the House of Representatives;<sup>299</sup> a similarly non-binding version was passed by the Georgia state Senate;<sup>300</sup> and a binding version of the Academic Bill of Rights which focused on student rights rather than faculty issues was withdrawn from the Colorado legislature only after a number of Colorado university officials reached a memorandum of understanding endorsing the views provided in the bill.<sup>301</sup>

Again, these bills are non-binding or, as in the Colorado case, inoperative with respect to faculty hiring and other fundamental university decisions. But

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<sup>296</sup> *Id.*

<sup>297</sup> See generally Yilu Zhao, *Taking the Liberalism Out of Liberal Arts*, N.Y. Times, April 3, 2004, at \_\_; Stanley Fish, 'Intellectual Diversity': *The Trojan Horse of a Dark Design*, Chron. of Higher Educ., Feb. 13, 2004, at \_\_ (quoting Horowitz as saying, "I encourage [students] to use the language that the left has deployed so effectively on behalf of its own agendas").

<sup>298</sup> See Zhao, *id.*; Fish, *id.*

<sup>299</sup> See H. Con. Res. 318 (Oct. 30, 2003).

<sup>300</sup> See Ga. S. Res. 661 (adopted March 22, 2004).

<sup>301</sup> See Memorandum of Understanding, available at [www.studentsforacademicfreedom.org](http://www.studentsforacademicfreedom.org); Zhao, *supra* note \_\_.

what if a binding version of the Academic Bill of Rights *were* passed? The Academic Bill of Rights purports to stand on the same principles that the Court relied on in *Grutter* – a belief in the importance of academic freedom and intellectual diversity. What would *Grutter*'s First Amendment have to say about such legislation?

The answer is, I think, clear but not without irony. On the institutional autonomy reading of *Grutter*, an academic institution whose educational mission is itself substantive – a university whose mission *involves* a conclusion about “political or religious beliefs” – is entitled to substantial deference in framing and advancing policies that support those substantive views. A religious university whose educational mission is to advance Southern Baptist views may refuse to hire or promote academics whose views counter or depart from those beliefs. A secular university department that concludes that Marxism is a dry well may eliminate courses advancing Marxist theory, just as surely as a science department may conclude that its truth-seeking mission would hardly be advanced by providing lectures advancing a Ptolemaic view of astronomy. A university that believes its educational mission requires it to advance liberal views on racial diversity may oppose the inclusion of more voices championing conservative views on racial diversity. To be sure, a university would have to advance credible evidence that its substantive views were indeed a part of its educational mission. But if it did, *Grutter*'s First Amendment would invalidate any attempt to subject it to the strictures of the Academic Bill of Rights.

Not without irony, I said. For the Academic Bill of Rights is, on its face, entirely consistent with the kinds of rationales for academic freedom – truth-seeking, intellectual diversity, and the like – that the Supreme Court has typically treated as supporting a constitutional right to academic freedom. And these are the same values that undergird the institutional autonomy reading of *Grutter*.<sup>302</sup> Yet, if I am correct, the *rule* of deference to decisions made by academic institutions that emerges from these values would foreclose the enforcement of an Academic Bill of Rights. By contrast, it is at least arguable that these values cut *against* prohibitions on hate speech or religious speech on campus. Yet, as I have suggested, the institutional autonomy reading of *Grutter* compels the conclusion that a university *may* impose these restrictions, as long as they are part and parcel of its academic mission.

We might draw two conclusions from this seemingly contradictory state of affairs. The first is that the institutional autonomy reading of *Grutter* is a prophylactic rule that has slipped its moorings. Like many prophylactic rules, it draws a wide boundary around the values it seeks to protect, even when that

<sup>302</sup> See Fish, *supra* note \_\_, at \_\_ (“It’s hard to see how anyone who believes (as I do) that academic work is distinctive in its aims and goals and that its distinctiveness must be protected from political pressures (either external or internal) could find anything to disagree with here.”).

boundary no longer corresponds to the values in question. Thus, although the institutional autonomy reading of *Grutter* is based on the value of truth-seeking and other standard rationales for academic freedom, it serves those values indirectly, not directly, by giving universities wide latitude to set their own academic policies. In so doing, as the contrast between the campus hate speech and Academic Bill of Rights examples suggests, this version of *Grutter*'s First Amendment gives universities latitude even in cases in which their academic policies would disserve the very rationales that have been offered for academic freedom. Such a rule could still be justifiable, however, if we favor universities to adopt a diversity of approaches to educational policy and academic freedom. Or it could be justified if we believe we are better off entrusting decisions on educational policy to educational institutions without reservation rather than allowing courts or legislators to make case-by-case determinations.

The second possible conclusion points to a deeper concern, which I touched on earlier: that the academic freedom values the Academic Bill of Rights seeks to protect are themselves incoherent, inaccurate, or non-existent. If Horowitz's defense of intellectual diversity as a core value of academic freedom fails under *Grutter*'s institutional autonomy principle, perhaps that is because universities do not all agree that intellectual diversity is an important value.<sup>303</sup> Or perhaps they agree on the end but not the means. This again suggests, as I have argued above, that courts – and supporters of the Academic Bill of Rights – cannot safely rely on a fixed justification for or definition of academic freedom.

I will canvass those issues more fully below. For now, it is simply important to note that even as the institutional autonomy reading of *Grutter* may support efforts by *universities* to impose university policies that do not treat all ideas or speakers alike, it may also bar legislators and regulators from imposing otherwise unobjectionable norms of intellectual diversity or equal treatment on universities from above.

## 5. Racially Based Scholarships

*Grutter*'s deferential First Amendment-based treatment of the university's right to determine who shall be admitted to study, and the forgiving breadth of scope with which it treated the narrow tailoring part of its Fourteenth Amendment inquiry, suggests that courts, colleges, and state and federal education officials may now revisit another heated issue affecting university admissions: the constitutionality of racially based scholarships.<sup>304</sup>

<sup>303</sup> Cf. Fish, *id.* at \_\_ (arguing that neither intellectual diversity nor “[c]itizen building” are academic activities).

<sup>304</sup> For commentary on this issue, see, e.g., B. Andrew Bednark, Note, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 Minn. L. Rev. 1391 (2001); Amy Weir, Note, *Should Higher Education Race-*

The leading case on this issue, *Podberesky v. Kirwan*,<sup>305</sup> addressed the University of Maryland's Banneker scholarship program, a merit-based scholarship program available only to African Americans.<sup>306</sup> The university maintained a separate scholarship program available to all students, but that program's merit standards were more stringent. Podberesky, a Hispanic student who met the Banneker scholarship requirements but not the requirements of the generally available scholarship program, challenged the university's maintenance of a separate program.

The Fourth Circuit decided *Podberesky* as if *Bakke*'s diversity interest did not exist, relying instead on the Supreme Court's stringent scrutiny of *remedial* racially conscious measures in *City of Richmond v. J.A. Croson Co.*<sup>307</sup> Thus, it looked – searchingly and critically – for evidence that the scholarship program was justified as a response to “the present effects of past discrimination.”<sup>308</sup> The university was unable to meet this high hurdle; whatever racial tensions existed at the university were not sufficiently linked to past discrimination to justify the program,<sup>309</sup> and in any event the program – which gave scholarships to *all* qualifying African American students, and not just those African American students from Maryland – was not narrowly tailored to remedy the past discrimination at issue.<sup>310</sup>

Given the uncertain status of *Bakke* at the time *Podberesky* was decided, it is perhaps unsurprising that the Fourth Circuit thought to apply *Croson* rather than look to the diversity rationale in evaluating the scholarship program. In any event, it is not clear whether the university advanced diversity as a rationale for its program.<sup>311</sup> It is thus understandable that commentators following *Podberesky*

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*Based Financial Aid Be Distinguished From Race-Based Admissions?*, 42 B.C. L. Rev. 967 (2001); William E. Thro, *The Constitutional Problem of Race-Based Scholarships and a Practical Solution*, 111 Ed. Law Rep. 625 (1996); Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 Wake Forest L. Rev. 759 (1995); Brian K. Landsberg, *Balanced Scholarship and Racial Balance*, 30 Wake Forest L. Rev. 819 (1995).

<sup>305</sup> 38 F.3d 147 (4th Cir. 1994).

<sup>306</sup> *Id.* at 152.

<sup>307</sup> 488 U.S. 469 (1989).

<sup>308</sup> *Podberesky*, 38 F.3d at 153.

<sup>309</sup> *Id.* at 154-57.

<sup>310</sup> *Id.* at 158-59.

<sup>311</sup> This may have something to do with the historical context in which it arose. The constitutionality of racially based scholarship programs was a disputed issue at this point, and at the time the litigation was conducted, the university may have believed the argument was not available to it. See, e.g., Weir, *supra* note \_\_, at 975-76 (noting that Department of Education had issued statement in 1990 declaring that race-based scholarships were unconstitutional and violated Title VI of the Civil Rights Act of 1994, and subsequently issued policy guidelines in 1994 suggesting that race-based financial aid was available to create a diverse student body).

assumed a diversity-based argument for racially based scholarships might be unsustainable.<sup>312</sup>

*Grutter* suggests that racially based scholarships may stand on surer footing than the *Podberesky* panel assumed.<sup>313</sup> This argument does not require as much detail as those offered above, because it is little more than a rehearsal of the Court's reasoning in *Grutter*. Quite simply, *Grutter* holds that universities may legitimately tailor their admissions programs to meet the educational goal of maintaining a diverse student body. That interest is grounded in the First Amendment and measures taken by the university to ensure that diversity, short of "outright racial balancing,"<sup>314</sup> will be viewed with some substantial degree of deference, despite the ostensibly "strict" level of constitutional scrutiny applied by the Court.

That reasoning applies equally to the case of racially based scholarships. A university that has a compelling interest in a diverse student body, and that may mold its admissions requirements toward that end, surely has an equal interest in ensuring that it can also "attract and retain" those students who serve the educational mission of maintaining student diversity,<sup>315</sup> particularly to the extent that such scholarships enable the school to attract and retain a critical mass of minority students.<sup>316</sup> *Grutter* thus suggests that universities ought to be able to confidently rely on their educational interest in student diversity in maintaining racially based scholarship programs.<sup>317</sup>

## 6. Single-Sex Schools, Historically Black Colleges, and Other Exclusive Educational Institutions.

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<sup>312</sup> See, e.g., Thro, *supra* note \_\_, at 623.

<sup>313</sup> Although that is not necessarily what some educational institutions, who have to plan outside the sanctuary of the law review, have concluded. See Daniel Golden, *Colleges Cut Back Minority Programs After Court Rulings*, Wall St. J., Dec. 30, 2003, at A1.

<sup>314</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>315</sup> Weir, *supra* note \_\_, at 987.

<sup>316</sup> Admittedly, this argument does not settle the question of whether a university may maintain racially based scholarships with lower requirements than those scholarships made available to students who do not belong to the relevant minority group(s). That was the case in *Podberesky*, see 38 F.3d at 152; Kennedy, *supra* note \_\_, at 770. That may depend on whether one believes that the admissions program employed by the University of Michigan Law School was as "flexible [and] nonmechanical" as the Court suggested it was in *Grutter*, 123 S. Ct. at 2342, or whether it actually placed a thumb on the scales of minority applicants. To the extent that a minority-based scholarship maintains a fixed lower eligibility requirement than the generally available requirement, it may come closer to the admissions program outlawed by the Court in *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003). But a university that maintained a larger pool of scholarship funds for minority students without applying a lowered eligibility standard for access to those funds could credibly argue that its actions fell outside the scope of *Gratz*.

<sup>317</sup> Cf. Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Ledge*, 103 Colum. L. Rev. 1596, 1599 (2003).

A final controversial issue to which *Grutter's* First Amendment may ultimately speak is the constitutionality of publicly funded single-sex or racially based educational institutions. As with the regulation of religious speech, I do not argue here that *Grutter* necessarily demands a sea change in the law's current treatment of those institutions. But it may give ammunition to those who wish to argue in favor of a different approach.

In both cases involving publicly funded single-sex education that have reached the Supreme Court, the Court struck down those institutions' admissions policies as gender discrimination. In the first case, *Mississippi University for Women v. Hogan*,<sup>318</sup> the Court sustained a challenge by a male applicant to a state-supported single-sex nursing school. Although the state attempted to justify the school's admissions policy on the ground that it "compensates for discrimination against women,"<sup>319</sup> the Court found that the school's discriminatory policy reflected "a desire to provide white women in Mississippi access to state-supported higher learning," not a desire to compensate them for any discrimination they had faced.<sup>320</sup> Moreover, since the Court found that women at the time earned most of the baccalaureate nursing degrees in both the United States and the state of Mississippi itself, it was hard to show that the program was necessary to compensate women for discrimination in the field.<sup>321</sup> Nor could the school justify its policy on the grounds of any pedagogical benefits enjoyed by women in a single-sex environment: the record did not show that admitting men to nursing classes affected teaching style, student performance, or classroom discussion.<sup>322</sup> In any event, since men were allowed to audit classes at the school, those pedagogical arguments would have been hard to make in the context of the case.<sup>323</sup>

Similarly, in *United States v. Virginia*,<sup>324</sup> the Court rejected the state of Virginia's arguments in favor of its state-supported "incomparable military college, Virginia Military Institute (VMI)."<sup>325</sup> Although the state advanced pedagogically based arguments that VMI's single-sex educational environment offered "important educational benefits" that would be hampered if women were permitted to attend the academy,<sup>326</sup> and that the school contributed to a diversity of educational approaches in the state's array of publicly funded institutions of higher learning,<sup>327</sup> the Court concluded that the program had not been established

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<sup>318</sup> 458 U.S. 718 (1982).

<sup>319</sup> *Id.* at 727.

<sup>320</sup> *Id.* at 727 n.13.

<sup>321</sup> *See id.* at 729.

<sup>322</sup> *See id.* at 731.

<sup>323</sup> *See id.* at \_\_\_\_.

<sup>324</sup> 116 S. Ct. 2264 (1996).

<sup>325</sup> *Id.* at \_\_\_\_.

<sup>326</sup> *Id.* at \_\_\_\_.

<sup>327</sup> *Id.* at \_\_\_\_.

for the purpose of advancing diversity in the state's educational programs,<sup>328</sup> and that to the extent the school's "adversative" method of training *did* constitute a unique approach to learning, the state could not justify excluding women from the benefits that unique institution offered.<sup>329</sup> Indeed, because the women's military academy established by the state to compensate for the continued sex segregation of VMI did not offer a similar adversative style of training, it was a mere "pale shadow of VMI,"<sup>330</sup> and could not justify the continued maintenance of separate facilities.

For present purposes, it is important to note that neither *Hogan* nor the VMI case absolutely foreclose single-sex education.<sup>331</sup> Thus, Justice O'Connor observed in *Hogan* that, "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."<sup>332</sup> And in *United States v. Virginia*, the Court repeatedly emphasized the "unique" opportunity offered by VMI's long history, resources, reputation, and unusual style of instruction, adding that the Court did not "question the State's prerogative evenhandedly to support diverse educational opportunities."<sup>333</sup> It is possible that Virginia's system of sex-segregated military academies could have passed muster if a court had found that such academies had been simultaneously opened, enjoyed similar resources,<sup>334</sup> and perhaps had also found that there was some pedagogically sound reason for the maintenance of gender segregation in the educational system.

Advocates for single-sex education for women have, in fact, advanced a host of pedagogical arguments in favor of such programs. According to the (admittedly mixed) research, female students benefit strongly from single-sex education: they are more likely to engage in classroom discussion, more likely to receive attention from their instructors, more likely to excel in math and science and pursue professional interests in those fields, less likely to suffer the indignities of peer harassment, and ultimately more likely to enjoy better self-images and seek broader opportunities, including jobs in fields that have

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<sup>328</sup> *Id.* at \_\_\_\_.

<sup>329</sup> *Id.* at \_\_\_\_.

<sup>330</sup> *Id.* at 2285 (quotation and citation omitted).

<sup>331</sup> For discussion, see, e.g., Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 Wis. L. Rev. 15; Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 Harv. Women's L.J. 19 (1998); Catherine A. O'Neill, *Single-Sex Education After United States v. Virginia*, 23 J. Coll. & Univ. L. 489 (1997); Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y.L. Sch. J. Hum. Rts. 95 (1997); William Henry Hurd, *Gone With the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 Duke J. Gender L. & Pol'y 27 (1997).

<sup>332</sup> *Hogan*, 458 U.S. at 728.

<sup>333</sup> *United States v. Virginia*, 116 S. Ct. at 2276 n.7.

<sup>334</sup> *Cf. United States v. Virginia*, 44 F.3d 1229, 1250 (Phillips, J., dissenting), *rev'd*, 116 S. Ct. 2264 (1996).



traditionally been closed to or less attractive to women, than girls or women who attend co-educational institutions.<sup>335</sup> Put in *Grutter*'s terms, single-sex education for women may "promote[ ] learning outcomes."<sup>336</sup>

All of these considerations gain added strength when considered under the deferential approach to educational mission that *Grutter* represents. To the extent universities enjoy insulation, on First Amendment grounds, when making "complex educational judgments," and to the extent a *non*-diverse student body enables a school to achieve its educational mission, *Grutter* suggests that these institutions should be able to claim substantial deference for their decision to admit a *narrower*, rather than a broader, range of students to the student body. Read for its emphasis on deference, in short, *Grutter* suggests that what is good for the goose is good for the gander: if diversity-based admissions can be justified as a sound means of achieving a school's educational mission despite the strict scrutiny of the Fourteenth Amendment, sex-segregated admissions policies may be able to command the same degree of deference from the courts.

What of racially exclusive colleges and universities? This concern sounds loudly in Justice Thomas's dissent in *Grutter*, building on concerns he has voiced elsewhere concerning the preservation of historically black colleges and universities.<sup>337</sup> As Justice Thomas observed, *Grutter* may in fact help preserve these institutions. If it does, however, it will do so on grounds that might well justify other efforts at experimentation with racially segregated educational systems.

There is no doubt that the history of segregation in the American educational system, including its system of state-supported higher education, suggests that any pedagogical benefits claimed for historically discriminatory institutions would face the same problems that the Mississippi nursing school faced in *Hogan*. Thus, the law is clear that states may not maintain a system of racially identifiable, effectively segregated institutions.<sup>338</sup> Although historically black colleges and universities in the United States maintain high enrollments of African Americans, they may not now simply exclude white or other non-black students, though the number of such students is tiny.<sup>339</sup>

A number of legal and educational scholars have argued in recent years that the promise of *Brown v. Board of Education* has proved chimerical, and that

<sup>335</sup> See Jennifer R. Cowan, *Distinguishing Private Women's Colleges From the VMI Decision*, 30 Colum. J.L. & Soc. Probs. 137, 141-42 (1997); Nemko, *supra* note \_\_, at \_\_-\_\_; see also Rosemary C. Salamone, *Same, Different, Equal: Rethinking School-Sex Schooling* (2003).

<sup>336</sup> *Grutter*, 123 S. Ct. at 2340.

<sup>337</sup> See *Grutter*, 123 S. Ct. at 2358 (Thomas, J., dissenting); *United States v. Fordice*, 505 U.S. 717, 745-46 (1992) (Thomas, J., concurring).

<sup>338</sup> See *Fordice*, 505 U.S. 717.

<sup>339</sup> See *Grutter*, 123 S. Ct. at 2358 (Thomas, J., dissenting).

black students would be well served by primary or higher education in a supportive, nurturing, racially exclusive environment.<sup>340</sup> Nevertheless, as those scholars recognize, many publicly supported historically black educational institutions may be in constitutional peril under the Court's current equal protection jurisprudence, fatally tainted by their long association with segregationist premises even if they have long outgrown the occasion for their birth.<sup>341</sup>

As Justice Thomas quite reasonably argued in his dissent, *Grutter's* First Amendment-grounded posture of deference to educational institutions' proffered academic justifications for admissions policies lends ammunition to the maintenance of these historically black institutions. Indeed, it might do so even if those institutions admitted few or no non-black students. If the majority in *Grutter* was entitled to treat with deference the Law School's claim that a diversity-based admissions policy would benefit its educational mission, so a historically black college should be entitled to deference if it argues that "racial homogeneity will yield educational benefits."<sup>342</sup> Although universities are still required to act "within constitutionally prescribed limits,"<sup>343</sup> *Grutter* at least suggests that a university that advanced sound pedagogical reasons for its racially exclusionary policies might be entitled to some significant leeway, at least as long as the school was not a mere vestige of *de jure* segregation, did not produce adverse impacts on its students, and "persist[ed] with[ ] sound educational justification."<sup>344</sup>

As with single-sex education, those are available, plausible and plentiful. Historically black universities may properly argue, based on their history and continuing role in the African American community, that they provide a unique

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<sup>340</sup> See, e.g., Mark Strasser, Plessy, Brown, and HBCUs: *On the Imposition of Stigma and the Court's Mechanical Equal Protection Jurisprudence*, 40 Washburn L.J. 48 (2000); Frank S. Adams, *Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 Ala. L. Rev. 481 (1996); Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 Emory L.J. 1 (1994); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 St. Louis U. L.J. 885 (1993); Christopher Steskal, Note, *Creating Space for Difference: The Case for African-American Schools*, 27 Harv. C.R.-C.L. L. Rev. 187 (1992); Pamela Smith, Note, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Towards Education*, 66 Tul. L. Rev. 2003 (1992); Drew Days III, *Brown Blues: Rethinking the Integrative Ideal*, 34 Wm. & Mary L. Rev. 53 (1992).

<sup>341</sup> See, e.g., Strasser, *supra* note \_\_, at 64-67; Frank Adams, Jr., *Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 Ala. L. Rev. 481, 483 (1996) ("Despite the view of Justice Thomas and many others [concerning] the present day value of HBCUs, the current state of the law threatens the continuing existence of these institutions in prior *de jure* racially segregated states").

<sup>342</sup> *Grutter*, 123 S. Ct. at 2358 (Thomas, J., dissenting).

<sup>343</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>344</sup> *Fordice*, 505 U.S. at 746 (Thomas, J., concurring).

educational mix with its own particular set of values.<sup>345</sup> Wendy Brown summarizes some of the common attributes of historically black universities in these terms:

The features of many HBIs [historically black institutions] which distinguish the academic experience include open enrollment, emphasis on public and community service, the inculcation of moral and ethical values, the promotion of democracy, citizenship, and leadership skills but also critical analysis as a catalyst for social change, demonstrated concern for the physical health and well-being of the student body and the communities from which they come, preparation for specific careers through liberal arts education, and African and African-American studies curricula.<sup>346</sup>

These unique attributes have again contributed to significant “learning outcomes”: greater intellectual development, positive social and psychological effects, greater ease in interpersonal relations, and greater cultural awareness.<sup>347</sup> Nor can any pedagogical evaluation of these schools ignore the fact that, to the community which they primarily serve, they honored as vital and important contributors to the well-being of the African American community and not as mere vestiges of segregation.<sup>348</sup>

All these pedagogical arguments surely are entitled to the same degree of deference as the arguments for diversity presented in *Grutter*. If read for all that it is worth, then, *Grutter* would appear to support the maintenance of these universities against an equal protection challenge. Whatever relief that may provide to supporters of historically black universities, however, it must be acknowledged as a matter of logic that those arguments could be raised in favor of a variety of experiments with racially exclusive higher education. Would the Court support the establishment and public funding of an all-white university, provided it could advance sound academic reasons in favor of such an institution? A university deliberately and expressly serving Hispanic students, or members of some other group? If that outcome seems unlikely for a variety of reasons, it is

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<sup>345</sup> For an admiring account, see Roy L. Brooks, *Integration or Separation? A Strategy for Racial Equality*, ch. 15 (1996).

<sup>346</sup> Brown-Scott, *supra* note \_\_, at 10-11.

<sup>347</sup> See Adams, *supra* note \_\_, at 496-97 (quoting James Washburn, Note, *Beyond Brown: Evaluating Equality in Higher Education*, 43 Duke L.J. 1115, 1149 (1994)); see also Leland Ware, *The Most Visible Vestige: Black Colleges After Fordice*, 35 B.C. L. Rev. 633, 634 (1994).

<sup>348</sup> See, e.g., John A. Moore, Note, *Are State-Supported Historically Black Colleges and Universities Justifiable After Fordice? – A Higher Education Dilemma*, 27 Fla. St. U. L. Rev. 547, 547 (2000).

still the case that the argument is supported by the constitutional logic of *Grutter*.<sup>349</sup>

Certainly Justice Thomas is not the only one to recognize this implication of the Court's approach. Long before *Grutter*, Charles Lawrence expressed his discomfort with a diversity rationale for affirmative action in higher education admissions, observing that Justice Powell's reasoning in *Bakke*, with its emphasis on deference to the views of the educational establishment, "could as easily justify an all white school as one that is racially diverse."<sup>350</sup> Strong supporters of *Grutter* acknowledged the same discomfort not long after the ruling was handed down.<sup>351</sup>

*Grutter* certainly does not absolutely compel the conclusion that courts must accept a regime of single-sex or racially segregated higher education, and *Hogan*, *Fordice* and other cases suggest most institutions would be hard pressed to prove that any racially exclusive admissions policies were motivated by purely pedagogical purposes. But the "tension" acknowledged by the supporters of *Grutter*'s acceptance of the diversity rationale is not a mere phantom. *Grutter*'s logic compels the conclusion that a wide range of educational missions may be entitled to deference on constitutional academic freedom grounds, even if they skirt different boundaries of the Fourteenth Amendment than did the University of Michigan Law School's admissions policy.

## 7. Conclusion

As this discussion has endeavored to show, the logical implications of the institutional autonomy reading of *Grutter*'s First Amendment are wide-ranging and significant. They counsel a different approach, and potentially different outcomes, with respect to a variety of controversial First Amendment issues. Under *Grutter*'s First Amendment, universities may have much greater discretion to shape the speech activities of their institutions, including the imposition of speech codes and the preclusion of at least some forms of religious speech. They may also have additional ammunition to contest the government's withdrawal of

<sup>349</sup> See also Dixon, *supra* note \_\_, at 78 ("It would seem to follow [from *Bakke*'s focus on diversity as a permissible but not compelled educational value] that academic freedom would permit some colleges to seek homogeneity *if* they had a rational basis for doing so.") (emphasis in original).

<sup>350</sup> Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. Rev. 757, 771 (1997).

<sup>351</sup> Transcript of American Constitution Society Conference, Session E: Segregation, Integration and Affirmative Action After *Bollinger*, Aug. 2, 2003 (remarks of Goodwin Liu noting that the "academic freedom argument . . . would seem to swing both ways" and could support arguments for segregated universities if they could be justified on educational grounds); see also *id.* (remarks of John Payton "acknowledging the tension [in the academic freedom argument]" and suggesting that the Law School "tried not to make too much of the academic freedom point" in its brief to the Supreme Court).

funding where, as with military recruiting on law school campuses, the government activity conflicts with their educational mission.

Moreover, as in *Grutter* itself, the implications of *Grutter*'s First Amendment carry beyond cases directly implicating speech itself. The "countervailing [First Amendment] interest"<sup>352</sup> of educational institutional autonomy that is identified in *Bakke* and reinforced in *Grutter* may alter the landscape of other areas of constitutional jurisprudence as well. Thus, universities, bolstered by *Grutter*'s First Amendment, may win greater freedom to employ a variety of race-conscious policies, including the use of race-specific scholarships and other funding mechanisms. Indeed, they may be able to argue in favor of single-sex or single-race admissions policies. As I have suggested above, because the arguments in favor of single-sex or single-race admissions policies would be grounded in pedagogical rather than remedial justifications, all-white or all-male institutions might find as much shelter under *Grutter* as all-female institutions or historically black colleges and universities.

A few points deserve emphasis here. First, I do not intend to suggest that any of the varied outcomes I have discussed above are *likely* to follow from *Grutter*. Indeed, I would venture to predict that while some version of the arguments I have outlined will be advanced in the courts, many will fail. This seems to be at least one early lesson from the Solomon Amendment. At the very least, given the significant reshaping of settled precedent that some of these outcomes represent, these arguments are unlikely to fare well in the *lower* courts, although some of them might ultimately find vindication in the Supreme Court. The point of this discussion has not been to predict real-world litigation outcomes, but to ask what outcomes follow from *Grutter*'s First Amendment discussion as a matter of *logical* implication.

But the importance of *Grutter*'s First Amendment, and of this paper, does not rest on its ultimate success in the courts. Indeed, that is one of the key points of this paper. Notwithstanding the Court's bold First Amendment rhetoric in *Grutter*, it is quite possible that it will turn out to be a "sport" in First Amendment caselaw, as *Bakke* arguably was before it.<sup>353</sup> But *Grutter* and *Bakke* still demand greater consideration within the world of First Amendment scholarship. If *Grutter*'s First Amendment does eventually have greater influence beyond the narrow confines of race-conscious admissions policies, the importance of carefully studying this aspect of *Grutter* will be obvious. But *Grutter* will raise serious questions for First Amendment scholars even if it *does* turn out to be a sport: What are the First Amendment principles announced in *Grutter*? Do they have greater application beyond the facts of that case? Do they *merit* greater application? And if the Court refuses to apply those principles elsewhere, why?

<sup>352</sup> *Bakke*, 438 U.S. at 313.

<sup>353</sup> See Byrne, *supra* note \_\_\_, at 315; Yudof, *supra* note \_\_\_, at 855-56.

In short, no matter what happens in the courts, *Grutter* deserves serious consideration as a First Amendment case.

Finally, it should be evident that the outcomes discussed in this section point in no particular direction. A university might stress *Grutter* in arguing *for* campus speech restrictions, or in asserting its right to *permit* a wide degree of potentially offensive speech. It might assert that its educational mission demands *more* religious speech on campus or *less* religious speech. It might argue in favor of the educational benefits of a homogeneous student body, but argue that *Grutter* supports an all-white or all-male school as much as a traditionally African American school – or more so, if the all-white school raises legitimate pedagogical arguments in its defense and the African American school is tainted in the eyes of the courts by its origins in *de jure* segregation.

On this reading, then, *Grutter*'s First Amendment is not about substantive values, but about *deference*: provided a university can supply a plausible academic justification of a policy, that policy may be accorded substantial deference notwithstanding its potential conflict with First Amendment jurisprudence or with other constitutional provisions. This reading of *Grutter* is therefore bound to please some constituencies and displease others, depending on the particular educational policy at stake.

To the extent one wishes to police the legal community for consistency, *Grutter*'s First Amendment thus provides a nice testing point: Are those who showered the decision in praise equally willing to live with a set of educational outcomes they find unwise or distasteful? For example, would the plaintiffs who have employed *Grutter*'s emphasis on institutional autonomy to oppose the Solomon Amendment be equally content to see that emphasis used to *support* an educational institution's ability to discriminate in favor of a different set of students or potential employers? Conversely, will those who criticized *Grutter* nevertheless adopt its First Amendment arguments to support their own set of educational policies?

There is another possibility, however. As I emphasized at the beginning of this section, *Grutter*'s First Amendment is susceptible to more than one reading. Instead of reading it as adopting a deferential posture toward university policy-making regardless of the specific educational policies and values at stake, we might read *Grutter* as having made a substantive commitment to *specific* educational values – and, by extension, to specific *political* values. It is to this possible reading of *Grutter*'s First Amendment that I now turn.

## **B. *Grutter*'s First Amendment As Substantive Commitment**

The focus on the institutional autonomy reading of *Grutter* has yielded a surprising and wide-ranging set of potential implications for First Amendment

doctrine and other aspects of constitutional law. But it is based on a particular reading of *Grutter*. So far, I have assumed that *Grutter* adopts a value-neutral conception of academic freedom. Provided that a university is making “academic decisions” with respect to policies that serve its “proper institutional mission,”<sup>354</sup> it is entitled to substantial deference. What constitutes a “proper educational mission,” on this reading, is substantially up to the university. A university may decide that its educational mission demands a diverse student body, or it may conclude that it has a pedagogical interest in maintaining a gender- or race-exclusive student body. It may decide that its mission demands the imposition of stringent and viewpoint-specific codes of civility in student speech, or that its mission demands wide-open debate and precludes the imposition of speech codes.

In each case, the discretion lies with the educational institution. Courts are not qualified to judge the “complex educational judgments”<sup>355</sup> that go into the formation of a university mission, and must assume that the university has reached its judgments about its proper educational mission, and the policies necessary to support it, in good faith.<sup>356</sup> This reading of *Grutter*, which is substantially based on the Court’s own language, thus preserves universities as “spheres of independence and neutrality” into which the government may not intrude.<sup>357</sup>

It is not, however, the only available reading of *Grutter*. Another reading of *Grutter* is decidedly not value-neutral. Rather, it reads *Grutter* as having made a substantive commitment to a *particular* vision of the proper educational mission of universities, law schools, and other institutions of higher education.

On this reading, *Grutter* offers a substantive vision of the university as fulfilling an important *democratic* function. This vision blesses the Law School’s arguments for a diverse student body not simply because they are the product of autonomous decision-making by an institution that is within its sphere of expertise, but because diversity in higher education – and particularly within elite bodies such as the University of Michigan Law School – provides broader goods that are part of the constitutional framework. Diversity in higher education is not just an *intrinsic* good that brings “learning outcomes”<sup>358</sup> to the educational process itself. Rather, it is an important *extrinsic* good.<sup>359</sup> Diverse student bodies “better prepare[ ] students for an increasingly diverse workforce and society, and

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<sup>354</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>355</sup> *Id.*

<sup>356</sup> *See id.*

<sup>357</sup> David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. Rev. 675, 683 (1992).

<sup>358</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>359</sup> Cf. Cynthia Estlund, *Taking Grutter to Work*, 7 Green Bag 2d 215, 217-18 (2004).

better prepares them as professionals.”<sup>360</sup> They produce a diverse leadership corps that is better able to deal with the realities of a “global marketplace.”<sup>361</sup>

More importantly, a diverse student body ensures that equal educational opportunity is available to all in order to provide for “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation.”<sup>362</sup> And diversity in *elite* educational institutions undergirds democratic legitimacy: it “cultivate[s] a set of leaders with legitimacy in the eyes of the citizenry” by ensuring that “the path to diversity [is] visibly open to talented and qualified individuals of every race and ethnicity.”<sup>363</sup> Thus, on the substantive reading of *Grutter*, the Court pledged allegiance to a substantive constitutional vision of the nature of higher education, one which emphasizes its continuity with a broader democratic vision of full and equal participation “in the civic life of our Nation.”<sup>364</sup>

A number of early examinations of *Grutter* have focused on this reading of the case. Robert Post, for example, sees in *Grutter* a vision of education “as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership.”<sup>365</sup> Universities, on this view, are not mere warehouses for researchers. They are, instead, both models of democratic dialogue<sup>366</sup> and training grounds for a well-trained and representative body of citizens. And Lani Guinier, in a statement that spotlights the two readings of *Grutter* I have stressed in this paper, argues that *Grutter* makes a positive statement about “the fundamental role of public education in a democracy,” by “link[ing] the educational mission of public institutions not only to the autonomy that the First Amendment gives universities to fashion their educational goals, but also to the broad democratic goal of providing upward mobility to a diverse cadre of future leaders.”<sup>367</sup> *Grutter*, in her view, is the starting point for a public discussion about the “democratic purpose of public education.”<sup>368</sup>

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<sup>360</sup> *Id.* at 2340 (quotation and citation omitted). For commentary on this aspect of *Grutter*, see Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 Yale L.J. 1093 (2004).

<sup>361</sup> *Id.* For a thoughtful treatment of this aspect of *Grutter*, see Thomas H. Lee, Essay, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 Fordham L. Rev. 2301 (2004).

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 2341.

<sup>364</sup> *Id.* at 2340.

<sup>365</sup> Post, *supra* note \_\_, at 60.

<sup>366</sup> See *id.* at 61 (identifying universities as fora “for participation in civic life”).

<sup>367</sup> Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113, 175 (2003); see also *id.* at 223 (noting the connection between “institutions’ educational and public missions”).

<sup>368</sup> *Id.* at 120. For other discussions focusing on *Grutter* as a substantive commitment to democratic values in education and beyond, see, e.g., Greenberg, *supra* note \_\_; Bollinger, *supra* note \_\_, at 1591-92.



As I have suggested above, this vision of the democratic purpose of higher education is not precisely the same as the description of the purposes of education offered in support of student body diversity by Justice Powell in *Bakke*.<sup>369</sup> The focus of that case was on goods that are intrinsic to the educational process. It was concerned with the exposure of students to diverse ideas and values *within* the university itself, in order to foster an atmosphere of “speculation, experiment and creation.”<sup>370</sup> Although that environment might have an impact on the nation’s future,<sup>371</sup> Justice Powell looked only to the educational environment itself. His diversity argument contemplated “only that the [nation’s future] leaders, who might all be white, should be attuned to a diversity of ideas and mores.”<sup>372</sup>

*Grutter*, by contrast, is expressly outward-looking; it is concerned not simply with the intrinsic value of diversity on campus but with the *extrinsic* value of education, particularly with regard to leadership and citizenship. Moreover, unlike *Bakke*, which is concerned only with the benefits that some putative set of future citizens and leaders might reap from a diverse student body, *Grutter* is concerned with the composition of that caste of citizens and leaders. It suggests that the legitimacy of higher education, and of the leaders it produces, rests on its representativeness and inclusiveness. It thus presents a significantly different picture of the nature and purpose of higher education than the one offered in *Bakke*.<sup>373</sup>

What might we make of this substantive vision of *Grutter*’s First Amendment – a vision of academic freedom as serving a particular democratic vision of higher education as both training *for* democracy and a miniature model of diversity *in* democracy? Most obviously, this reading of *Grutter* may imply a different approach to the various free speech and other constitutional issues discussed above than the approach suggested by an institutional autonomy reading of *Grutter*. An educational institution defending a particular policy, such as a set of restrictions on campus speech or the establishment of a single-sex university, would be faced with a different justificatory task under this reading: rather than

<sup>369</sup> Cf. Post, *supra* note \_\_\_, at 60.

<sup>370</sup> *Bakke*, 438 U.S. at 312.

<sup>371</sup> See *id.* at 312-13.

<sup>372</sup> Greenberg, *supra* note \_\_\_, at 1618.

<sup>373</sup> The changing nature of the Court’s vision of educational diversity is acknowledged in Jeffrey S. Lehman, *The Evolving Language of Diversity and Integration in Discussions of Affirmative Action from Bakke to Grutter*, in Patricia Gurin, Jeffrey S. Lehman, and Earl Lewis, *Defending Diversity: Affirmative Action at the University of Michigan* 61 (2004). Lehman, who was involved in the *Grutter* litigation as Dean of the Law School, acknowledges the difficulties involved in speaking consistently of diversity over the course of the litigation, in court and in public, although I suspect he places too much weight on the evolving nature of diversity discourse in general and too little on the conflict between the Law School’s purposes and its need to fit within the juridical categories imposed by the Court.

emphasize the connection between its policy and its educational mission, it would be obliged to show a connection between the educational mission itself and broader democratic values outside the immediate context of the university.

It is easy to conceive of such arguments regarding some, if not all, of the issues discussed above. It would be no great stretch, for example, to assert that “education . . . is the very foundation of good citizenship,”<sup>374</sup> and racial epithets and other instances of campus speech targeted at particular segments of the university community erect a barrier to the full participation of some groups in institutions of higher learning. Consequently, racially offensive speech on campus ultimately impedes some groups’ full enjoyment of and participation in democratic citizenship. Thus, campus speech restrictions could be as plausibly justified under the democratic reading of *Grutter* as they could under the institutional autonomy reading.

Other issues might compel different outcomes, however. I have suggested, for example, that under the institutional autonomy reading of *Grutter*, a sincere pedagogical justification of single-sex or single-race university education might justify such admissions policies against any claims of discrimination. It is not clear that equally compelling reasons could be mustered in favor of gender- or race-exclusive admissions policies under the democratic reading of *Grutter*. To be sure, one could argue that if educational outcomes for women or African Americans are improved under a system of sex- or race-exclusive higher education, then those programs will ultimately increase the ability of traditionally disadvantaged groups to fully participate in democratic society, both as leaders and as citizens. But if *Grutter* sees universities as both a conduit to and a model of democratic participation – in Robert Post’s words, if the Court sees universities as “fora[ ] for participation in civic life”<sup>375</sup> – then single-sex or single-race institutions may be seen as falling short of this participatory ideal.

I will not develop these alternative arguments at length. Suffice it to say that it is not clear that the same set of policy implications for other First Amendment or constitutional issues would follow under the democratic reading of *Grutter* as under the institutional autonomy reading of *Grutter*. The more interesting questions about this reading of *Grutter*’s First Amendment, however, reside beyond the realm of litigation strategy. The democratic reading of *Grutter*’s vision of academic freedom is interesting because it raises larger questions: questions of fit and consistency with the larger body of First Amendment doctrine, and questions about the Court’s willingness to embrace a specific, contestable conception of the purpose of the university.

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<sup>374</sup> *Grutter*, 123 S. Ct. at 2340 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).  
<sup>375</sup> Post, *supra* note \_\_\_, at 61.

One way to see this problem of consistency is to compare the democratic reading of *Grutter*'s First Amendment – the reading of the case as embodying a substantive ideal of participatory democracy, and as a signal that public institutions ought to be free to take steps to enhance full and equal participation in that democracy – with one current stream of First Amendment thought. Several prominent First Amendment theorists, drawing on the work of Alexander Meiklejohn,<sup>376</sup> have argued that the First Amendment should be understood not as supporting an individualistic vision of speech as self-actualization, but as serving a substantive vision of democracy as self-government.<sup>377</sup> In Owen Fiss's words, "The purpose of free speech is . . . the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live."<sup>378</sup> In Sunstein's terms, this approach represents a turn from free speech as an unregulated marketplace of ideas to a system dedicated to deliberative democracy.<sup>379</sup>

Under this theory, a purely context-insensitive, rule-oriented approach to First Amendment issues may properly be amended or abandoned when that approach interferes with the larger goal of democratic self-government. In order that "public debate might be enriched and our capacity for collective self-determination enhanced,"<sup>380</sup> the state "may sometimes find it necessary to restrict the speech of some elements in our society in order to enhance the relative voice of others."<sup>381</sup>

This democratic approach to free speech may thus demand a set of departures from current free speech doctrine. Under this model of free speech and self-government, the state may properly enact greater restrictions on the spread of pornography, to ensure that "everyone ha[s] an equal chance to speak and to be heard";<sup>382</sup> it may allocate subsidies in content-specific ways to "further the sovereignty of the people by provoking and stirring public debate";<sup>383</sup> it may restrict hate speech where that speech "helps contribute to the creation of a caste

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<sup>376</sup> See, e.g., Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1965); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245; Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).

<sup>377</sup> See, e.g., Sunstein, *supra* note \_\_, at xvii (describing his project as the "effort to root freedom of speech in a conception of popular sovereignty").

<sup>378</sup> Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* 13 (1996).

<sup>379</sup> See Sunstein, *supra* note \_\_, at 17-23, 50-51 (elaborating on this point).

<sup>380</sup> Fiss, *supra* note \_\_, at 19.

<sup>381</sup> *Id.* at 30; see also Sunstein, *supra* note \_\_, at 37 (constitutional questions posed in First Amendment cases should be: "Do the rules promote greater attention to public issues? Do they ensure greater diversity of view?").

<sup>382</sup> Fiss, *supra* note \_\_, at 87.

<sup>383</sup> *Id.* at 107.

system”;<sup>384</sup> it may intervene in the sphere of election-related speech to “promote democratic processes.”<sup>385</sup> In short, government may employ a number of regulatory approaches to speech in order to enhance our system of self-government and deliberative democracy.

This approach to First Amendment problems has been criticized elsewhere, and any lengthy treatment of this question is beyond the proper scope of this paper.<sup>386</sup> For present purposes, I want to make two observations. First, this democratic self-government approach to the First Amendment may be seen as closely linked to the democratic conception of education and academic freedom offered by the second reading of *Grutter* that I have described. In both cases, the driving force behind the First Amendment (or its subsidiary, academic freedom) is a particular vision of free speech as serving a sphere of democratic self-government in which legitimacy depends on the full and equal participation of all groups. And in both cases, that vision of democracy may demand intervention by the state (or its subsidiary, the public university) to ensure access to the democratic forum for all.

Second, both the general democratic approach to the First Amendment and the democratic reading of academic freedom in *Grutter* are arguably distinct from the courts' usual approach to the First Amendment. Certainly the leading advocates for a democratic approach to free speech recognize that their views are not consistent with the larger body of First Amendment jurisprudence.<sup>387</sup> While the democratic theorists of the First Amendment stress the need to shape First Amendment doctrine to meet specific concerns about equality and diversity of debate in the public sphere, even if that requires state intervention, the courts typically approach free speech issues through a lens of state neutrality that is suspicious of any state intervention in the arena of public debate.<sup>388</sup> The resulting laissez-faire attitude toward speech often ends up supporting existing distributions of power and media access, a state of affairs that First Amendment

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<sup>384</sup> Sunstein, *supra* note \_\_, at 193. This capsule description misses much of the nuanced flavor of Sunstein's position, which would not demand sweeping departures from current doctrine. Nevertheless, it is accurate enough for these purposes to note that Sunstein's deliberative democracy account of free speech would compel both a different approach to problems of hate speech regulation and a somewhat different result.

<sup>385</sup> *Id.* at 85; see also *id.*, ch. 4.

<sup>386</sup> See, e.g., Paul Horwitz, *Citizenship and Speech*, 43 McGill L.J. 445 (1998); Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 Mich. L. Rev. 1517 (1997); William Marshall, *Free Speech and the "Problem" of Democracy*, 89 Nw. U. L. Rev. 191 (1994); Martin H. Redish and Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 Cal. L. Rev. 267 (1991).

<sup>387</sup> See, e.g., Sunstein, *supra* note \_\_, at 16 (“[A] reconnection of the First Amendment with democratic aspirations would require an ambitious reinterpretation of the principle of free expression.”).

<sup>388</sup> See Fiss, *supra* note \_\_, at 5.

scholars concerned with enhancing public debate find deeply troubling.<sup>389</sup> It is thus clear that these theorists argue for a significant reshaping of First Amendment theory and doctrine.<sup>390</sup>

Similarly, the democratic reading of *Grutter* suggests a different approach to First Amendment issues, at least in the arena of academic freedom. It does not rely on a view of the university as a marketplace of ideas. Nor, despite the Court's language, does it directly rely on a conception of the university community as serving the "robust exchange of ideas."<sup>391</sup> Rather, the democratic reading of *Grutter* depicts the university as both a small-scale model of and an entrance gate for a democracy in which "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential."<sup>392</sup> To that end, the university may intervene in an ostensibly neutral admissions process to ensure diversity in the body of students participating in university life and, ultimately, citizenship and leadership.

This reading of *Grutter* thus invites questions about whether the Court's vision of the First Amendment in this case is consistent with its approach to free speech issues elsewhere in its jurisprudence. If it is not, at least two responses are possible. One may take this inconsistency as further evidence that *Grutter*'s First Amendment is good for one case and one case only, a conclusion that necessarily undermines some of the force of the opinion. Alternatively, one may see *Grutter*'s First Amendment as an invitation to revisit the Court's general approach to the First Amendment. I take up one aspect of that invitation below.<sup>393</sup> The only untenable approach is indifference. By taking a markedly different approach to the First Amendment, *Grutter* demands either serious consideration of the merits of the opinion, or serious reconsideration of the merits of the Court's general approach to the First Amendment.

### C. Is *Grutter*'s First Amendment Consistent With the Court's First Amendment Jurisprudence?

In the two sections immediately above, I have offered two potential readings of *Grutter* as a First Amendment case – one that focuses on institutional deference and one that offers a more substantive, democratically oriented vision of the First Amendment. As I have suggested, if these readings are inconsistent with the broad run of First Amendment opinions issued by the Supreme Court, two possibilities present themselves: either *Grutter* can be treated as a sport for

<sup>389</sup> See Sunstein, *supra* note \_\_\_, at 50.

<sup>390</sup> See, e.g., *id.* at 252.

<sup>391</sup> *Grutter*, 123 S. Ct. at 2339 (quoting *Bakke*, 438 U.S. at 313 (in turn quoting *Keyishian*, 385 U.S. at 603)).

<sup>392</sup> *Id.* at 2340-41.

<sup>393</sup> See Part IV, *infra*.

First Amendment purposes, or the Court itself ought to reexamine its First Amendment caselaw.

But *is Grutter*, on either of the alternative readings offered above, inconsistent with the Court's First Amendment jurisprudence? One way to approach this question is to examine the approach taken to the First Amendment by the Justices who joined the majority in *Grutter*, and that taken by the dissenting Justices in *Grutter*. What emerges from this discussion is something of a mixed record, which may in itself be revealing.

Focusing first on the majority Justices, the two Justices who seem most consistent in their approach with respect to both *Grutter* and other First Amendment cases are Justices Breyer and Stevens. In both his extrajudicial writing and his writing on the Court, Justice Breyer has emphasized an approach to the First Amendment that "[f]ocus[es] on participatory self-government."<sup>394</sup> Like Sunstein and Fiss, Justice Breyer argues for an approach that looks back to "the Constitution's more general objectives,"<sup>395</sup> and considers whether a particular speech regulation serves "the ability of some to engage in as much communication as they wish and . . . the public's confidence and subsequent ability to communicate."<sup>396</sup> Justice Breyer is thus suspicious of First Amendment rules that treat all speech as equal, and all speech restrictions as equally deserving of suspicion.<sup>397</sup> That approach is inconsistent with the more general objective of ensuring "democratic government,"<sup>398</sup> which may counsel permitting speech regulations in some cases despite their conflict with general rules of content neutrality. This context-specific, democratically oriented approach is evident in Justice Breyer's writing on such issues as campaign finance regulations and commercial speech.<sup>399</sup>

Similarly, Justice Stevens has voiced his suspicion of general First Amendment rules such as the prohibition on content-based regulation, suggesting that they may "obfuscate[ ] the specific facts at issue and interests at stake in a given case."<sup>400</sup> He advocates an approach to First Amendment cases that exhibits "a sensitivity to fact and context that allows for advancement of the principles underlying the protection of free speech."<sup>401</sup> This approach is evident in his First

<sup>394</sup> Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 254 (2002).

<sup>395</sup> *Id.* at 255.

<sup>396</sup> *Id.* at 253 (referring specifically to communication in the electoral process).

<sup>397</sup> *See, e.g., id.* at 253, 255.

<sup>398</sup> *Id.* at 255.

<sup>399</sup> *See, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399-405 (2000) (Breyer, J., concurring); *United States v. United Foods, Inc.*, 533 U.S. 405, \_\_ (2001) (Breyer, J., concurring). *See also* Jerome A. Barron, *The Electronic Media and the Flight From First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. Mich. J.L. Reform 817 (1998).

<sup>400</sup> Hon. John Paul Stevens, *The Freedom of Speech*, 102 Yale L.J. 1293, 1307 (1993).

<sup>401</sup> *Id.* at 1305.

Amendment jurisprudence,<sup>402</sup> and, as I have suggested above, it is consistent with his treatment of academic freedom jurisprudence.<sup>403</sup>

So Justices Breyer and Stevens may be seen as taking positions in *Grutter* that are broadly consistent with the drift of their general views on the First Amendment. What of the other Justices who joined the majority in *Grutter*? Here, I think, the record is more mixed. To be sure, at least some of the other Justices have on occasion taken a more pragmatic, narrow, institutionally oriented view of First Amendment problems, rather than a broad, institution-indifferent, rule-based approach. For example, Fred Schauer has argued that Justice O'Connor's opinion in *National Endowment for the Arts v. Finley*,<sup>404</sup> although nominally relying on conventional doctrinal rules of First Amendment analysis, in fact depended on the unique nature of the arts-funding function performed by the NEA.<sup>405</sup> Closer to the subject at hand, as we have seen, Justice Souter's concurring opinion in *Southworth* rejected the imposition of a "cast-iron viewpoint neutrality requirement" on the University of Wisconsin, and argued that "protecting a university's discretion to shape its educational mission may prove to be an important consideration" when judging the propriety of student fees under the First Amendment.<sup>406</sup>

Still, these occasional eruptions of dissatisfaction with traditional doctrinal analysis are not the same thing as a generally consistent and different approach to the First Amendment, whether it resembles the institution-specific or democratic readings of *Grutter* or some other vision of the First Amendment. Instead, most of the Justices who joined *Grutter* have, for the most part, willingly followed traditional categorical First Amendment rules in a substantial number of cases. Even Justice Stevens, who I have suggested does have a fairly consistent case-specific approach to the First Amendment, has at times displayed an unwillingness to depart from traditional First Amendment rules.<sup>407</sup>

<sup>402</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 778 (1982) (Stevens, J., concurring in judgment); *Young v. American Mini Theatres*, 427 U.S. 50, 63 (1976).

<sup>403</sup> See *Widmar*, 454 U.S. at 278 (Stevens, J., concurring in judgment).

<sup>404</sup> 118 S. Ct. 2168 (1998).

<sup>405</sup> See Schauer, *supra* note \_\_, at 96-97.

<sup>406</sup> *Southworth*, 529 U.S. at \_\_ (Souter, J., concurring in the judgment). Consistent with the analysis provided above, Justice Souter was joined here by Justices Breyer and Stevens. See also Barron, *supra* note \_\_, at 855-56 (arguing that Justice Souter's approach to electronic media cases was "medium-specific and pragmatic," and skeptical about "the utility of categorical analysis in resolving the First Amendment issues raised by the new electronic media").

<sup>407</sup> See, e.g., *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1644 (1998) (Stevens, J., dissenting). Justice Stevens here rejected any suggestion that a different First Amendment approach should apply where a state institution acts as a broadcaster, instead treating the state public television station in this case as if it were any other state actor subject to the usual First Amendment restraints on its exercise of discretion. See Schauer, *supra* note \_\_, at 89. Again consistent with my suggestion that most of the Justices in the *Grutter* majority are neither especially loyal nor especially hostile to traditional forms of First Amendment analysis, Justice

A similarly mixed reading is possible on a review of the dissenting Justices in *Grutter*. In important respects, the Justices who dissented in that case have regularly hewed close to categorical First Amendment rules, rejecting any sort of institution-specific or substantive democratic reading of the First Amendment.<sup>408</sup> Thus, Justice Thomas has refused to draw institutional or fact-bound distinctions in a variety of other First Amendment contexts, including commercial speech<sup>409</sup> and broadcast media regulation.<sup>410</sup> That rejection of institution- or medium-specific distinctions in the First Amendment is of a piece with his skepticism in *Grutter* about the “constitutionalization of ‘academic freedom,’”<sup>411</sup> and his rejection of the idea that the First Amendment could provide special constitutional privileges to a public university.<sup>412</sup>

In this sense, it might appear at first blush that the dissenters in *Grutter*, to the extent the case turned on First Amendment values, acted with greater loyalty and consistency across a range of First Amendment cases than did the *Grutter* majority. That observation might offer some comfort (albeit decidedly cold comfort) to the dissenting Justices’ more politically conservative allies in the legal academy.

On another view, however, the dissenting Justices in *Grutter* are equally guilty of inconsistency with the First Amendment values they have advanced elsewhere. For this insight, we may turn to some of these Justices’ own academic supporters. In recent writing, John McGinnis, among other scholars, has attempted to characterize the Rehnquist Court as moving toward “an encompassing jurisprudence” based on the “decentralization and private ordering of social norms.”<sup>413</sup> One vehicle for this process of decentralization is an

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Stevens was joined by Justices Souter and Ginsburg. Justice Souter also rejected Justice O’Connor’s institution-specific approach in *Finley*, treating the NEA as no differently situated for purposes of First Amendment analysis than any other government actor. *See Finley*, 118 S. Ct. at 2185 (Souter, J., dissenting); Schauer, *supra* note \_\_\_, at 96.

<sup>408</sup> See, e.g., Barron, *supra* note \_\_\_, at 859-72 (discussing First Amendment approaches of Justices Kennedy and Thomas).

<sup>409</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (“I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech.”).

<sup>410</sup> See, e.g., *Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part). For discussion, see Barron, *supra* note \_\_\_, at 869-70 (arguing that Justice Thomas’s opinion in *Denver Area* “denie[s] the validity of any First Amendment theory that is instrumental in its objectives and pluralistic in its coverage or scope”).

<sup>411</sup> *Grutter*, 123 S. Ct. at 2357 (Thomas, J., dissenting).

<sup>412</sup> See *id.*

<sup>413</sup> John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 Cal. L. Rev. 485, 489 (2002); see also Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841 (2001).



increased “solicitude for civil associations.”<sup>414</sup> In a host of cases, including *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,<sup>415</sup> *Boy Scouts of America v. Dale*,<sup>416</sup> and *California Democratic Party v. Jones*,<sup>417</sup> the Rehnquist Court has offered a far stronger level of protection for freedom of association than that provided by the Warren or Burger Courts.<sup>418</sup> That freedom necessarily includes the power of associations to “exclude individuals whose mere presence is antithetical to their expressive norms.”<sup>419</sup>

If this is an accurate description of the Rehnquist Court’s movement in the area of freedom of expression, let alone an umbrella description of a jurisprudence cutting across various constitutional provisions, as McGinnis would have it, it is hard to square with the dissents in *Grutter*. Surely the first reading of *Grutter* I have canvassed here – the deferential reading – is far more consistent with the Tocquevillian movement McGinnis describes than the dissent’s approach to *Grutter*. It permits educational institutions to organize their “membership” as they see fit and to shape social norms through a diversity-based approach to university admissions standards. It does not mandate that they do so, and recognizes that many universities will not take this approach to the admissions process. Some may adopt class-based admissions standards, and some may simply open the gates wide. But those institutions that wish to admit on the basis of some diversity-oriented vision of the university are free to do so, consistent with their status as autonomous social institutions. By contrast, the dissenters in *Grutter* would shut down entirely any attempt, by public universities at least, to shape the student community according to a perceived need for diversity.

Thus, if any faction on the Court was following a Tocquevillian vision in *Grutter*, it was the majority and not the dissent. To the extent McGinnis can be read as including *Grutter*’s dissenting Justices among those who have championed the jurisprudence he describes, therefore, they stand fairly accused of inconsistency in *Grutter*.<sup>420</sup>

To be sure, there are some reasonable objections to this account. First and foremost, McGinnis recognizes that even a Court that is more attentive to freedom of association might still “be less willing to permit associations to exclude

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<sup>414</sup> McGinnis, *id.* at 492.

<sup>415</sup> 515 U.S. 557 (1995).

<sup>416</sup> 530 U.S. 640 (2000).

<sup>417</sup> 530 U.S. 567 (2000).

<sup>418</sup> See, e.g., Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 Minn. L. Rev. 1483, 1494 (2001).

<sup>419</sup> McGinnis, *supra* note \_\_, at 533.

<sup>420</sup> McGinnis is careful not to associate his description of the Rehnquist Court’s jurisprudence with any individual members. See *id.* at 489 n.10. Still, the opinions he treats as illustrative of the Court’s increased attention to mediating institutions were authored entirely by Justices – Rehnquist, Scalia, and Kennedy – who dissented in *Grutter*.

[certain] identifiable groups,” such as racial minorities, “on First Amendment grounds.”<sup>421</sup> But McGinnis himself is at least ambivalent about this prospect,<sup>422</sup> and he appears to suggest that some greater scope of freedom might be available to institutions such as universities, including freedom to shape admissions decisions along racial grounds, if the school advanced the argument that its “expression of . . . values” would be harmed by state intervention with respect to its admissions choices.<sup>423</sup> That is precisely the objection raised by the University of Michigan in *Grutter*.

It might also be argued that whatever additional protections McGinnis's Tocquevillian Court has accorded to civic associations, that focus has been on *private* institutions rather than public institutions. I do not think this argument can be fully reconciled with McGinnis's broader constitutional vision, however. That vision treats the Court's protection of private civic associations as only one component of a broader vision of autonomous and decentralized institutions both private *and* public – “states, secular and religious associations, and juries” are among the honor roll.<sup>424</sup> If the Court's vision instructs us to “focus on associations themselves, and on the content and function of their expression,”<sup>425</sup> perhaps the associative role of public universities should weigh heavier in the balance than their tenuous connection to government.

In sum, the verdict on *Grutter*'s consistency with the Court's First Amendment jurisprudence is, perhaps surprisingly, at least mixed. Surely the democratic reading of *Grutter*'s First Amendment offered above presents a fairly imperfect fit with the larger body of First Amendment caselaw. Even here, however, it is least consistent with some of the First Amendment writings of Justice Breyer, and perhaps Justice Stevens. Similarly, the deferential reading of *Grutter*, though again not wholly in line with the Court's generally categorical and institution-insensitive approach to the First Amendment, is consistent with some of the Justices' prior academic freedom opinions, and may present a fit with a broader tendency on the Rehnquist Court to favor the autonomy of civic associations.

The fit is decidedly an awkward one, to be sure, and it is hard to resist the conclusion that no Justice writing in *Grutter* took seriously its First Amendment implications. The strongest likelihood is that the Court used the First Amendment both to buttress its conclusions in *Grutter* and to limit the reach of this affirmative action decision to educational institutions. Just the same, the Court's decision to frame the case in First Amendment terms leaves those who would seek to find (or

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<sup>421</sup> *Id.* at 536.

<sup>422</sup> *See id.* at 537 n.263.

<sup>423</sup> *Id.* at 537 n.264 (discussing *Runyon v. McCrary*, 427 U.S. 160 (1976)).

<sup>424</sup> *Id.* at 495.

<sup>425</sup> Garnett, *supra* note \_\_\_, at 1844; *see also id.* at 1853.

impose) a coherent shape on the Court's First Amendment jurisprudence with the obligation to reexamine that jurisprudence with the new decision in mind. And the very fact that some coherent tale can be told suggests something. It suggests that the Court, or some of its individual members, are struggling to find some new vision of the First Amendment: one that looses the self-imposed bonds of a series of generally applicable rules, and instead trusts to institutions themselves to shape their own, more context-sensitive rules. That story of *Grutter's* First Amendment is told in Part IV.

#### IV. TAKING FIRST AMENDMENT INSTITUTIONS SERIOUSLY

##### A. Introduction

So far, I have offered two different First Amendment readings of *Grutter*: one emphasizing the importance of educational institutional autonomy, regardless of the content of the academic policies of the institution in question, and one championing the university in advancing a particular substantive vision of democracy. Each, as we have seen, has its potential and its problems. The institutional autonomy reading of *Grutter* lets a thousand flowers bloom, encouraging universities to experiment with different visions of education and academic freedom; but it also permits them to shape academic policies that some will find profoundly objectionable or inconsistent with the core values of academic freedom and university education. The substantive, democratic reading of *Grutter* advances a vision of democratic education that again will find many adherents in the academy, especially in the ranks of civic republicans and other scholars who have articulated a substantive vision of the role of the Constitution in encouraging participatory democracy. At the same time, it is hard to see this approach as consistent with the broader body of First Amendment jurisprudence; nor does it present a perfect fit with visions of academic freedom outside the courts.

I have refrained from direct discussion of a third reading of *Grutter's* First Amendment until now, although it bears a close kinship with the institutional autonomy reading of *Grutter* and may be clear by implication from the discussion that has preceded this section. It will become clear that, although this vision of *Grutter* raises the most troubling questions and must be much more fully fleshed out, I also believe it is the most promising reading of *Grutter* and portends a sea change in First Amendment jurisprudence.

Before turning to that reading of *Grutter*, it is important to consider the current state of First Amendment jurisprudence. As Frederick Schauer has observed, for the most part, the Supreme Court has been "institutionally agnostic" in its treatment of First Amendment issues.<sup>426</sup> Its general approach has been one

<sup>426</sup> Schauer, *supra* note \_\_\_, at 120.

of generality and principle rather than specificity, narrowness, and policy on the ground.<sup>427</sup> It has seen the First Amendment through a lens of “juridical categories,”<sup>428</sup> in which all speakers and all factual situations, no matter how varied, are compressed into a series of legal questions: What general category of speech is implicated here: incitement, commercial speech, pornography? What kind of legal rule is implicated: content-neutral, viewpoint-specific, or a time, place and manner restriction? Is the speaker public or private? These questions sometimes overlap with questions of factual context, but their contours are hardly the same and the nature of the inquiry undertaken by the courts is entirely different. The nature of the speaker, its role in society, the kinds of social or professional norms that govern a particular kind of speech act even absent the specter of legal dispute – all these facts have been less important than the conceptual cubbyhole into which the dispute must be placed once it reaches the court. In Holmes’s terms, the Court has thought about words, not things.<sup>429</sup>

This preference for rules over facts, this relative insensitivity to the nature of the institutions before the courts, is evident throughout the congeries of rules and principles that govern the law of the First Amendment. A few examples will suffice to illuminate this point. Consider the role of the press in First Amendment law. As a general rule, albeit with some exceptions,<sup>430</sup> the Court has rendered the Press Clause of the First Amendment a virtual nullity, refusing to grant special privileges to the press or to treat media institutions differently than it would any other speaker under the First Amendment.<sup>431</sup> Religious institutions have come in for similarly categorical, rule-oriented treatment. Thus, a narrow majority of the Court has refused to grant special accommodations under the Free Exercise Clause to religious groups where they challenge neutral laws of general applicability,<sup>432</sup> disdaining any approach that would require judges to “weigh the social importance of all laws against the centrality of all religious beliefs.”<sup>433</sup> As

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<sup>427</sup> See *id.* at 119-20.

<sup>428</sup> *Id.* at 119.

<sup>429</sup> See Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1899).

<sup>430</sup> See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm’n of Revenue*, 460 U.S. 575 (1983) (striking down a use tax on the cost of paper and ink products used in the production of periodicals). See generally Jon Paul Diltz, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 Comm. L. & Pol’y 25, 27 (2002) (listing other instances in which the press appear to have been granted a preferred status under the Constitution); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 Stan. L. Rev. 927, 927-28 (1992).

<sup>431</sup> See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 798-802 (1978) (Burger, J., concurring); *Branzburg v. Hayes*, 408 U.S. 665, 691-92 (1972); see also Anthony Lewis, *A Preferred Position for Journalism?*, 7 Hofstra L. Rev. 595, 605 (1979) (“No Supreme Court decision has held or intimated that journalism has a preferred constitutional position”); David Lange, *The Speech and Press Clauses*, 23 UCLA L. Rev. 77, 118-19 (1975).

<sup>432</sup> See *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>433</sup> *Id.* at 890. See Kathleen M. Sullivan, *The Supreme Court, 1991 Term: Foreword – The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 84-85 (1992) (discussing *Smith* as an

many critics have recognized, the Court's treatment of religion has traveled from a substantive concern with the distinctive role of religious groups and practices to a less protective but more generally applicable, fact-insensitive focus on formal neutrality.<sup>434</sup>

That institution-indifferent approach is perhaps best captured, however, by the Court's focus on content neutrality in free speech cases. That approach employs a simple, broad taxonomy in evaluating free speech claims, subjecting them to different levels of scrutiny depending on whether the speech restrictions at issue are content-neutral, content-based, or viewpoint-based.<sup>435</sup> As Erwin Chemerinsky has observed, this approach "has become the cornerstone of the Supreme Court's First Amendment jurisprudence."<sup>436</sup>

The Court's attempt to craft a one-size-fits-all methodology of adjudicating free speech issues may have much to recommend it as a general rule.<sup>437</sup> If we are concerned about the potential for abuse inherent in allowing courts to weigh the costs and benefits of each speech act according to a balance of their own devising, it makes perfect sense to constrain them through the application of general rules. Rules protect us by precluding judges from adding irrelevant or illegitimate factors to the balance.

But this approach carries its own risks.<sup>438</sup> In particular, it carries the risk that the Court, in attempting to shape actual disputes to fit the Procrustean bed of content neutrality or other generally applicable rules, will often miss the facts and policies that counsel different approaches in different cases. It risks missing what is distinctive about the varied circumstances of speech, and about the particular

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exemplar of Justice Scalia's preference for strict rules over looser standards and balancing tests); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1009 (1990) (free exercise of religion after *Smith* "now means that churches cannot be taxed or regulated any more heavily than General Motors").

<sup>434</sup> See, e.g., Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 Ga. L. Rev. 489 (2004); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119 (2002); Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 Harv. C.R.-C.L. L. Rev. 505 (1998); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 Sup. Ct. Rev. 323, 390 (noting a "movement [on the Court] away from robust interpretations of the two Religion Clauses, under which religion must be treated as special . . . , and toward principles of equal treatment and legislative discretion").

<sup>435</sup> See, e.g., Clay Calvert, *Free Speech and Content Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 McGeorge L. Rev. 60, 70 (1997); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983).

<sup>436</sup> Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 Wm. & Mary Bill of Rts. J. 647, 650 (2002).

<sup>437</sup> See Schauer, *supra* note \_\_, at 119-20.

<sup>438</sup> For a powerful discussion of these issues, see Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. Chi. L. Rev. 397 (1989) (book review).

institutions and practices that contribute to a full and rich public discourse. And by maintaining a focus on what is *internal* to law – on how different speech acts should be classified according to different *legal* categories – it ignores the fact that, as we have seen in our discussion of professional academic freedom, various institutions have their *own* norms and practices, their own methods of self-governance, and their own distinct contribution to make to the greater good.

In short, an institution-insensitive approach to the First Amendment gains (some) clarity and predictability. But it may often become unmoored from the particular practices and institutions that make free speech so worth protecting in the first place. It is simply not true that a library is a university is a private speaker is a newspaper is a religious community. Each acts distinctively; each serves a distinctive purpose; each governs itself distinctively according to its own norms; and each has a distinct and independent value to the broader environment of free speech. Robert Post puts the point well:

First Amendment doctrine can recover its rightful role as an instrument for the clarification and guidance of judicial decisionmaking only if the court refashions its jurisprudence so as to foster a lucid comprehension of the constitutional values implicit in *discrete* forms of social order. The Court must reshape its doctrine so as to generate a perspicuous understanding of the necessary material and normative dimensions of these forms of social order and of the relationship to these values and dimensions.<sup>439</sup>

## B. *Grutter* and First Amendment Institutions

This is where the third, final, and, I will argue, the best reading of *Grutter*'s First Amendment comes in. What makes *Grutter* so important as a First Amendment case is that, like few other cases in the First Amendment jurisprudence, and more explicitly than most of those, it abandons the usual posture of institutional indifference. In its conclusion that educational autonomy is a significant interest under the First Amendment, and in its effort, however fraught and imperfect, to tie that interest to a broader understanding of the *value* of universities, *Grutter* does not simply look to generally applicable rules. It does not suggest that a university is governed by precisely the same rules that apply to a normal employer, or a library, or a street-corner speaker.<sup>440</sup> Instead, it adopts a constitutional approach to free speech that is highly sensitive to the particular

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<sup>439</sup> Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1280-81 (1995) (emphasis added).

<sup>440</sup> Cf. Gail Paulus Sorenson, *The 'Public Forum Doctrine' and its Application in School and College Cases*, 20 J.L. Educ. 445, 445-46 (1991) (noting the difficulties courts have had applying public forum doctrine to schools and colleges).

institutional character of the party before the Court. It takes institutions seriously as First Amendment subjects.

Of the readings of *Grutter* we have canvassed so far, this is the First Amendment reading of *Grutter* that carries the greatest potential implications and ought to spark the most interest and debate. By taking institutions seriously, *Grutter* points the way toward the possibility that the Court's First Amendment approach could vary depending on the nature of "local and specific kinds of social practices."<sup>441</sup>

Indeed, *Grutter* does not just suggest this approach, but exemplifies it. Consider the gulf between this case and other affirmative action cases the Court has decided in recent years. Nowhere has the Court been as sympathetic to the practices and aims of the institution whose affirmative action policies were under attack as it is here – not when it dealt with a municipal employer,<sup>442</sup> nor when it dealt with the federal government itself as an employer.<sup>443</sup> If the Court had adopted the same approach in *Grutter*, it is quite likely the outcome would have favored the plaintiffs, not the law school.

But, to borrow a paraphrase from the Court's death penalty jurisprudence, education is different. Speaking of the Court's affirmative action cases, Akhil Amar and Neal Katyal once observed that it had said "a lot about contracting and rather little about education."<sup>444</sup> That observation is key to understanding *Grutter*'s First Amendment: it is a First Amendment that is sensitive to the special character of particular institutions, particular social practices. By singling out universities as having a *special* interest in diversity sufficient to give them a compelling interest in race-conscious policies, and by subjecting those policies to what any reasonable observer must conclude is a far more deferential level of

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<sup>441</sup> Post, *supra* note \_\_, at 1273. It should be evident by now that this article owes a significant intellectual debt to Post's work, although it differs from Post in its particular emphasis on First Amendment institutions and in its desire to descend from theory to more immediate operational concerns. For a fuller exposition of his vision of the First Amendment, focused not on First Amendment institutions but on different domains of social order, see Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (1995).

<sup>442</sup> See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>443</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (addressing policy favoring minority contractors under the Small Business Act). One notable exception is *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), which upheld preferential treatment for racial minorities in the grant of broadcast licenses. *Metro Broadcasting* has been widely assumed to have been curtailed, if not overruled, by *Peña*. In any event, since that case itself involved a First Amendment institution – broadcasters – it can, if anything, be seen as supporting *Grutter*'s institution-sensitive approach to constitutional law.

<sup>444</sup> Akhil Reed Amar and Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1746 (1996).

scrutiny than would apply to other institutions, *Grutter* truly suggests that not all institutions are equal under the First Amendment.<sup>445</sup>

At the same time, and unlike the educational autonomy and democratic readings of *Grutter* offered above, which are *only* concerned with the special role of universities, the institution-sensitive reading of *Grutter* carries potential implications far beyond the ivory tower. For where one institution has gone, others may try to follow. *Grutter* may counsel other institutions – religious institutions, media institutions, libraries, perhaps professionals,<sup>446</sup> and perhaps still other institutions – to seek from the Court the same recognition that they have special roles to play in the social firmament and ought, perhaps, to be treated according to special rules. If one takes *Grutter* seriously as a First Amendment decision, as its language certainly allows, it may provide ammunition for a broader effort to overturn an institutionally agnostic, top-down approach to the First Amendment in favor of one that builds from the ground up, constructing First Amendment doctrine in response to the actual functions and practices of particular social institutions.<sup>447</sup>

As I have suggested, this approach is not wholly absent from the Court's existing jurisprudence, although it is generally disfavored. But this understanding of *Grutter*'s First Amendment implications ties the scattered exceptional cases together under the common concept of taking First Amendment institutions seriously.

Thus, in the same week that it issued its opinion in *Grutter*, the Court decided *United States v. American Library Association*,<sup>448</sup> holding that Congress could validly require public libraries that receive federal funding to install filter software to block the receipt of obscene materials or child pornography by library computer users. Pivotal to that decision was the fact that library users could request that the filters be disabled.<sup>449</sup> For present purposes, however, the result is less important than the reasoning by which the Court reached it. The Court began by asking *why* we value libraries, and *how* they operate.<sup>450</sup> It began with the

<sup>445</sup> For this reason, I doubt *Grutter* carries much significance for the future of affirmative action programs outside the university. For discussion of this issue, see, e.g., Cynthia Estlund, *Taking Grutter to Work*, 7 Green Bag 2d 215 (2004); Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 Ky. L.J. 263 (2003-2004).

<sup>446</sup> For an argument that the Court already treats professional speech according to different rules than it applies to other speakers, in an attempt to "preserve its particular social function," see Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 777 (1999).

<sup>447</sup> See Philip Selznick, 'Law in Context' Revisited, 30 J. L. & Soc'y 177, 181-82 (2003) (arguing, in context of discussion of academic freedom, that law ought to recognize the "requirements and dynamics" of particular social institutions).

<sup>448</sup> 123 S. Ct. 2297 (2003).

<sup>449</sup> See *id.* at 2306-07.

<sup>450</sup> See *id.* at 2303-04, 2305.



assumption that a crucial legal question in determining the constitutionality of Congress's law was whether libraries were left free to "fulfill their traditional mission[ ]."<sup>451</sup> Accordingly, it held that libraries must be left with substantial discretion to exercise their professional role of collecting, storing, and distributing information.<sup>452</sup> With this institution-specific approach in mind, the Court rejected any attempt to shoehorn the library's practices into some juridical category like "public forum."<sup>453</sup>

Similarly, Frederick Schauer and others have observed that the Court sometimes treats even the government differently, setting aside traditional modes of analysis such as public forum, where the government institution in question is fulfilling the role of a traditional First Amendment institution and is substantially governed by the norms and practices of that institution. Thus, in *Arkansas Educational Television Commission v. Forbes*,<sup>454</sup> the Court based its decision that a federally funded local broadcaster could exclude a candidate from a debate, in seeming departure from traditional public forum analysis, on the fact that the broadcaster was acting as a professional journalist and exercising editorial discretion.<sup>455</sup> And in *National Endowment for the Arts v. Finley*,<sup>456</sup> the Court held that principles of content neutrality were inapplicable to the government where it was acting as an arts funding body – an institutional role that requires and presupposes the need to make content distinctions.

*Grutter's* First Amendment, as I have read it here – an institution-sensitive First Amendment that defers to the practices of particular kinds of First Amendment actors – provides the link between these otherwise far-flung cases. Viewed through a traditional First Amendment lens, *Grutter* and the other cases involve widely different issues: content discrimination doctrine, public forum doctrine, the constitutionality of affirmative action. Nor are the facts particularly similar. But in each case, the Court confronted the practices of a specific First Amendment institution and recognized that traditional First Amendment doctrine would not preserve the institutions' ability to "fulfill their traditional missions."<sup>457</sup> Faced with this dilemma, the Court allowed doctrine to give way before reality.

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<sup>451</sup> *Id.* at 2304.

<sup>452</sup> *See id.*

<sup>453</sup> *See id.* at 2304-05; *id.* at 2304 (noting that public forum principles were "out of place in the context of this case"); *see also* Sorenson, *supra* note \_\_ (noting similar difficulties in cases involving schools and colleges).

<sup>454</sup> 523 U.S. 666 (1998).

<sup>455</sup> *See id.* at 672-74. *See also* Schauer, *supra* note \_\_, at 91 ("[I]n the end it is the institutional character of public broadcasting as broadcasting . . . that appears to have determined the outcome of the case").

<sup>456</sup> 524 U.S. 569 (1998).

<sup>457</sup> *American Library Ass'n*, 123 S. Ct. at 2304.

At this point, even someone who is convinced that there is something to this reading of *Grutter* is entitled to ask: How does it work? What does it mean, precisely? Why should we scrap a reasonable working set of doctrinal rules in favor of this reading of *Grutter* if we do not yet know what rules that reading entails?

In offering a tentative answer to these questions, I am able to offer something less than a complete blueprint, but something more than a mere mood or sensibility.<sup>458</sup> On this reading, *Grutter*'s First Amendment entails at least the following principles:

1. First and most obviously, the Court should recognize the special importance to public discourse of particular First Amendment institutions. It is not as yet clear how many such institutions there are, how to resolve boundary disputes about whether a particular party falls within this institutional framework (is a blog "the press?"<sup>459</sup>), and whether the institutional turn I advocate here should cover a few important institutions or a large number. But some candidates are obvious, both because of their own distinctiveness and because the Court has already signaled its recognition of some of them: universities, print and broadcast media organizations, religious groups, libraries, public schools.
2. The Court should adopt a policy of substantial deference to these organizations, as it did to the University of Michigan Law School in *Grutter*. It should do so both because of their distinctive importance to public discourse and because (as I discuss below) of the institutional norms that already serve to constrain them.<sup>460</sup>
3. The boundaries of the Court's deference will involve two different sorts of limitations. The first is the limitation acknowledged by the Court in *Grutter* – a First Amendment institution is entitled to deference "*within constitutionally prescribed limits.*"<sup>461</sup> At some

<sup>458</sup> I am comforted by the fact that I am in distinguished company in this. See Schauer, *supra* note \_\_, at 118, 119-20 (suggesting that both he and the Court have yet to fully grapple with the implications of an institutionally sensitive approach to the First Amendment); Post, *supra* note \_\_, at 1281 (recognizing that his advice that the Court shape its doctrine in ways that are respectful of particular social practices is "rather abstract advice. It certainly will not assist the Court in settling any particular controversy."). Although this article cannot offer an equivalent of Post's sophisticated theoretical analysis, I hope it can advance some slightly more concrete suggestions about how to resolve particular controversies.

<sup>459</sup> See, e.g., Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 *Hous. L. Rev.* 1371 (2003).

<sup>460</sup> For detailed discussion on this point, see Post, *supra* note \_\_, at 257-65.

<sup>461</sup> *Grutter*, 123 S. Ct. at 2339 (emphasis added).

point, a First Amendment institution runs up against fundamental constitutional principles that simple deference cannot overcome. But this, I want to suggest, is the *less* important limitation. After all, as *Grutter* suggests, deference to First Amendment institutions may allow those institutions to stretch, if not break, otherwise applicable constitutional rules. Surely this explains the Law School's ability to overcome what the Court at least nominally labeled "strict scrutiny" so easily. Indeed, what *Grutter*'s First Amendment ultimately suggests is that, by allowing First Amendment institutions room to experiment with different means of carrying out their institutional missions, the Court is really allowing those institutions to help *shape* constitutional law outside the courts.<sup>462</sup>

4. The Constitution, then, does not provide the primary constraint on First Amendment institutions. What does? The answer is: the institution itself. Taking First Amendment institutions seriously entails recognizing, far more than current First Amendment jurisprudence does, that these institutions are defined and constrained by their own institutional culture.<sup>463</sup> Universities, newspapers, religious groups – all these institutions live by their own, often highly detailed and rigid, norms and practices. And all of them have means – dismissal, expulsion, denial of tenure – of enforcing those norms. The most powerful method of enforcement, however, is not the prospect of formal discipline but the simple fact that members of institutions operate within the norms of those institutions, internalize the culture of that institution as their own ethos, and wish to do so.<sup>464</sup> Thus, the most powerful constraints on the behavior of First Amendment institutions are the constraints that come from the institutions themselves. In judging a First Amendment institution's liberty to act, the Court should thus begin, as it did in the *American Library Association* case, by applying the norms and values of the institution itself. This is why the Court's deference in *Grutter* stemmed from the fact that the

<sup>462</sup> On the interrelationship between constitutional law inside the courts and constitutional culture outside the courts, see Post, *supra* note \_\_\_\_.

<sup>463</sup> Cf. Post, *supra* note \_\_\_, at 1273 (The most general objection to any single free speech principle is that speech makes possible a world of complex and diverse social practices precisely because it becomes integrated into and constitutive of these different practices; it therefore assumes the diverse constitutional values of these distinct practices.”).

<sup>464</sup> For discussion, see, e.g., Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 Tul. L. Rev. 605 (2004); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 Vand. L. Rev. 1955 (2001); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. Pa. L. Rev. 2237 (1996).

*Grutter's First Amendment*

Law School was acting according to a legitimate “academic decision.”<sup>465</sup>

5. If the Court is to set the boundaries of deference to First Amendment institutions according to the practices of those institutions themselves, it must also recognize that those boundaries are constantly shifting and changing. Institutional norms are not fixed and static. They change and evolve as institutions change and evolve. It once would have been unthinkable for a university to shift its admissions standards to reach for racial and ethnic diversity – just as it once would have been unthinkable for many of the same select institutions to apply admissions standards in order to achieve absolute meritocracy without regard to race, ethnicity, or class. Thus, in determining the bounds within which First Amendment institutions are entitled to substantial constitutional deference, the Court should be responsive to shifts in institutional norms and practices over time. We have already seen that one possible criticism of *Grutter*, and of other academic freedom decisions issued by the Court, is that they failed to realize that the concept of *professional* academic freedom was itself a fluid one. This does not present an insuperable dilemma, by any means; in other contexts, courts are experienced at taking evidence on and deciding cases according to the evolving customary practice of an industry. But the Court should be aware of the issue; it should not rush to enshrine a particular institutional norm as a fixed constitutional standard.
6. Finally – and this admittedly is more of a mood than a rule – taking First Amendment institutions seriously entails the recognition that constitutional law is not simply the creature of the courts. It is the product of a constantly shifting, negotiated relationship between a variety of parties and values: the courts’ own understanding of constitutional law, their understanding of the values and norms of institutions in the “real world” outside the courts; the institutions’ own understanding of their norms and values; and the institutions’ understanding of their role within the broader constitutional structure. In Robert Post’s terms, it is a constant negotiation between constitutional law and constitutional culture. And this negotiation takes place on both sides: just as courts are constantly adjusting their understanding of constitutional doctrine to take account of the real world of social practices, so the institutions are constantly reevaluating their own norms according to their sense of

<sup>465</sup>*Grutter*, 123 S. Ct. at 2339.

the boundaries of the Constitution. So, for instance, universities' understanding of academic freedom has been influenced over time both by professional debate over the concept and by the influence of the changing constitutional landscape. In short, one reason for courts to defer to First Amendment institutions is because it does not represent constitutional abdication. Instead, it represents a more sophisticated understanding of the degree to which First Amendment institutions already internalize constitutional values, and the extent to which they help shape constitutional values.

This is decidedly still less than a blueprint. But *Grutter* and the other cases discussed above have already gone some of the distance toward giving us more concrete standards. At bottom, the basic understanding of what it means to take First Amendment institutions seriously is hardly mysterious. It means refusing to believe that one size fits all in constitutional doctrine. It requires the courts to defer substantially to decisions made by fundamental First Amendment institutions within the shifting scope of their own institutional values. And, at a more abstract but wholly fundamental level, it entails the courts' own recognition that they have a central role to play, but a *shared* role, in shaping our constitutional culture.

### C. Democratic Experimentalism, Reflexive Law, and *Grutter's* First Amendment

I have already argued that the institution-sensitive approach to the First Amendment I have drawn from *Grutter* is echoed elsewhere in the Court's existing jurisprudence, if dimly and imperfectly. Here, I want to briefly suggest that it also finds echoes in a number of recent approaches to constitutional law. I want to focus here on two recent arguments that have been made for a more flexible, decentralized approach to constitutional law that relies substantially on the subjects of constitutional law to shape their own norms and practices, while still ensuring an important role for the courts.

The first such argument has been made by a number of scholars, prominently including but not limited to Michael Dorf and Charles Sabel, who have advocated "a new model of institutionalized democratic deliberation that responds to the conditions of modern life."<sup>466</sup> Under this approach, which is only

<sup>466</sup> Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 283 (1998). See also Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875, 885 n.29 (2003) (citing examples of scholarship exploring these ideas). Cf. Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 Stan. L. Rev. 2113, 2125 n.50 (2003) (describing this approach as the "Columbia School" of thought). For a recent critical but supportive evaluation of democratic experimentalism, see Jamison E. Colburn, "Democratic Experimentalism": A Separation of Powers for Our Time?, 37 Suffolk U. L. Rev. 287 (2004); see also William E. Scheuerman,

briefly sketched here, courts would leave a variety of local institutions with substantial latitude “for experimental elaboration and revision [of their activities] to accommodate varied and changing circumstances.”<sup>467</sup> At the same time, courts would monitor these institutions to ensure that they met basic standards of legality and did not infringe individual rights.<sup>468</sup> Perhaps most importantly, experimentalist institutions would provide information about the relative success or failure of their projects, which would in turn inform both other institutions engaged in similar practices, and the courts themselves, gradually shaping the courts’ own sense of the outer boundaries of permissible experimentation.<sup>469</sup> Thus, the courts would be cast in the role of coordinating authority, allowing a web of local players to develop ways of addressing a particular policy issue – for example, nuclear safety, environmental regulation, or the treatment of drug criminals<sup>470</sup> – while establishing a rolling set of benchmarks for “best practices” that flow up from the local experimenters rather than down from a court or regulator.<sup>471</sup>

Although the value of democratic experimentalism can perhaps best be seen in areas such as administrative law or public policy, rather than in straight conflicts over rights, the experimentalist school contends that here, too, courts can act in a way that “call[s] into existence a system of experimentation” rather than simply “laying down specific rules.”<sup>472</sup> In these cases, particularly where a debate over constitutional rights and duties poses questions of judicial competence arising either from the moral complexity or the factual complexity of the situation, a court can decide not to decide too much.<sup>473</sup> It can instead lay down a general standard that could be met in a variety of ways, and so “devolv[e] deliberate authority for fully specifying norms to local actors.”<sup>474</sup>

For example, in the field of sexual harassment – a statutory regime, albeit one with broader, quasi-constitutional aspects and implications<sup>475</sup> – the Supreme

*Democratic Experimentalism or Capitalist Synchronization?: Critical Reflections on Directly-Deliberative Polyarchy*, 17 Can. J.L. & Juris. 101 (2004).

<sup>467</sup> Dorf and Sabel, *supra* note \_\_, at 283.

<sup>468</sup> *See id.* at 288.

<sup>469</sup> *See id.*

<sup>470</sup> *See, e.g., id.* at 371-88; Michael C. Dorf and Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 Vand. L. Rev. 831 (2000).

<sup>471</sup> *See* Colburn, *supra* note \_\_, at 289.

<sup>472</sup> Dorf, *supra* note \_\_, at 961; *see also* Dorf and Sabel, *supra* note \_\_, at 444-69.

<sup>473</sup> Dorf, *supra* note \_\_, at 886 (experimentalist courts resolve difficult problems by “giv[ing] deliberately incomplete answers”). *Cf.* Horwitz, *supra* note \_\_, at 120-25 (arguing that courts, particularly in the early stages of a developing and uncertain area of constitutional law, should issue minimalist opinions rather than attempt to cover the doctrinal field too quickly). This argument was based on concerns about relationships between *courts*, and did not discuss the role of extralegal actors.

<sup>474</sup> Dorf, *supra* note \_\_, at 978.

<sup>475</sup> *See id.* at 961.

Court has refused to lay down categorical rules governing workplace behavior, recognizing the “constellation of surrounding circumstances, expectations, and relationships” in the workplace that render a concrete rule beyond the Court’s competence.<sup>476</sup> Instead, by establishing a safe harbor for employers that take reasonable care to avoid and remedy harassment,<sup>477</sup> it has cast courts “in the role of monitoring employers’ monitoring of their workplaces,”<sup>478</sup> while allowing employers to shape a variety of responses to the problem of workplace sexual harassment.<sup>479</sup> In turn, we may expect a set of “best practices” to emerge as different policies are shown to be effective or ineffective in addressing the problem. Thus, rather than making itself a central rights-giver, the Court has cast itself as a problem-solver, tasking local actors with the primary responsibility for crafting solutions while maintaining a monitoring and coordinating role.

A similar set of proposals is broadly captured by the overlapping concepts of “reflexive” or “autopoietic” law.<sup>480</sup> In short, reflexive law is “regulation of regulation.”<sup>481</sup> It advocates the abandonment, in at least some cases, of command-and-control regulation in favor of a regulatory model that “set[s] a general standard to govern self-regulation by the affected actors.”<sup>482</sup> As noted above, the Court’s approach to sexual harassment law is an example of a reflexive regulatory strategy.

Similarly and relatedly, autopoietic theories of law begin with the presumption that society consists of a series of subsystems, such as politics, education, and the legal system,<sup>483</sup> each of which operates according to its own internal and self-referential norms, and each of which interacts only imperfectly with other subsystems. Given these boundary issues, the best way to regulate is not by direct regulation, but by “specifying procedures and basic organizational norms geared towards fostering self-regulation within distinct spheres of social

<sup>476</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998).

<sup>477</sup> *See Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998).

<sup>478</sup> Dorf, *supra* note \_\_\_, at 963.

<sup>479</sup> *See Susan Sturm, Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001).

<sup>480</sup> *See, e.g., Jean L. Cohen, Regulating Intimacy: A New Legal Paradigm* (2002); Gunther Teubner, *Law as an Autopoietic System* (1993); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & Soc’y Rev. 256 (1983). For a related approach, see Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1978). In describing this complex approach, however briefly, I am all too aware that “its conceptual architecture is forbidding enough to discourage casual visitors.” Hugh Baxter, *Autopoiesis and the “Relative Autonomy” of Law*, 19 Cardozo L. Rev. 1987, 2083 (1998). I acknowledge the warning, but nevertheless will treat reflexive law and autopoiesis as substantially overlapping approaches, notwithstanding important differences between the two theories that need not concern us here.

<sup>481</sup> Michael C. Dorf, *The Domain of Reflexive Law*, 103 Colum. L. Rev. 384, 391 (2003).

<sup>482</sup> *Id.* at 393.

<sup>483</sup> *See Baxter, supra* note \_\_\_, at 1993-94.

activity.”<sup>484</sup> The autopoietic approach requires that local actors observe certain “basic procedural and organizational norms,” but beyond that it gives substantial autonomy to those actors to craft their own substantive programs.<sup>485</sup> The goal, ultimately, is to find a way to encourage local actors to internalize basic norms of self-regulation within the norms of their own subsystems.<sup>486</sup>

The relationship between these approaches and the institution-sensitive approach to the First Amendment that I have argued forms *Grutter*’s First Amendment should by now be clear.<sup>487</sup> Each approach begins from a presumption that local actors, local institutions, should (and, according to autopoietic theory, must) have an important role to play in shaping even fundamental public policies. Each proceeds from the assumption that imposing general rules from above is doomed to result in suboptimal decisions, and that there should instead be a symbiotic, evolving relationship between the norms of local actors and the norms adopted by central regulatory authorities. And each assumes that the best way to achieve this is to cast the central regulatory authority – here, the courts – in a coordinating role, in which it polices the outer boundaries of acceptable practice while allowing local actors to substantially craft their own policies. In turn, each actor – local and central – will learn from and influence the other.

There are important differences, of course. Crucial to Dorf’s experimentalist project, for instance, is the demand that local institutions “justify the deference they demand by producing a record of performance that can withstand comparative assessments.”<sup>488</sup> By contrast, the institution-sensitive approach to the First Amendment I have advocated nowhere expressly provides for feedback to the courts or to similar institutions. Its central feature is deference *tout court*, without any formal program for monitoring or benchmarking. Deference is not, in and of itself, experimentation, nor is it necessarily reflexive in nature.

But one should not make too much of the distinction. For as I have argued, and as Robert Post has convincingly shown,<sup>489</sup> the boundaries between constitutional law and constitutional culture as it is understood outside the courts are already constantly blurred. Although the institution-sensitive reading of *Grutter* described in this section relies primarily on deference to First Amendment institutions, it is to be expected in the nature of things that those institutions will

<sup>484</sup> William E. Scheuerman, *Reflexive Law and the Challenges of Globalization*, 9 J. Pol. Phil. 81, 84 (2001).

<sup>485</sup> *Id.*

<sup>486</sup> *See id.*

<sup>487</sup> The relationship between democratic experimentalism and reflexive law should also by now be evident. *See* Dorf, *supra* note \_\_, at 386 (acknowledging the similarity).

<sup>488</sup> Dorf, *supra* note \_\_, at 981. *See also* Colburn, *supra* note \_\_, at 289.

<sup>489</sup> *See* Post, *supra* note \_\_ [Harvard Foreword].



incorporate basic constitutional norms into their own understanding of themselves as functioning institutions, just as the courts will incorporate their understanding of the shifting nature of the cultural norms and practices of First Amendment institutions into constitutional law as they police the shifting boundaries of constitutionally permissible deference. Indeed, the requirement that courts, in setting and policing those boundaries, pay attention to both basic constitutional norms and basic institutional practices suggests a fundamentally experimentalist, or reflexive, approach: one in which the courts lay down a general procedural requirement – for example, is this a legitimate *academic* decision?<sup>490</sup> Is this task properly within the role of a library?<sup>491</sup> Is this an exercise of professional journalist discretion?<sup>492</sup> – while permitting the institutions substantial latitude to operate within these minimal standards.

Of course, that these approaches are similar does not validate the institution-sensitive reading of *Grutter*'s First Amendment, any more than my reading of *Grutter* can validate experimentalist or reflexive theories of law. Rather, these familial resemblances suggest two things. First, they suggest that the idea of taking First Amendment institutions seriously is no mere frolic. It has substantial roots in a common set of approaches to constitutional law. If that does not lend it legitimacy, it at least suggests – particularly when coupled with the fact that the Court has in fact adopted this approach on several occasions, most prominently *Grutter* – that it is a viable, credible approach.

Second, it suggests a common complaint. Legal doctrine needs to be sufficiently abstract in order to constrain those who make decisions under its banner, and to cover a variety of factual situations without descending into unfettered discretion and judicial usurpation. At the same time, the tendency toward generally applicable rules of law, at least in the First Amendment arena, moves the courts in a direction that ultimately deprives it of the ability to give due regard to the varied social systems in which speech acts actually take place.<sup>493</sup> If it no longer makes sense to fit all cases on the rack of content neutrality or other generally applicable First Amendment doctrine, we need a new approach before those doctrines become incoherent. A new balance must be struck. Taking First Amendment institutions seriously is one means of striking a new bargain between the courts and the First Amendment institutions they oversee.

#### D. Questions and Implications, With A Digression on State Action

<sup>490</sup> See *Grutter*, 123 S. Ct. at 2339.

<sup>491</sup> See *American Library Ass'n*, 123 S. Ct. at 2304.

<sup>492</sup> See *Finley*, 523 U.S. 569.

<sup>493</sup> Cf. Dorf, *supra* note \_\_, at 883-84; Post, *supra* note \_\_, at \_\_. [Recuperating First Amendment Doctrine]

This section has argued for a reading of *Grutter*'s First Amendment that focuses on the importance of taking so-called First Amendment institutions seriously. It has advocated that courts recognize the important role that First Amendment institutions play as loci for, and definers of, public discourse. It has suggested that courts grant these institutions substantial deference to govern themselves, subject to generous constitutional limits and to procedural and substantive requirements drawn from the norms and practices of the institutions themselves. Finally, it has noted a close kinship between this reading of *Grutter* and similar projects aiming to encourage the courts to take a more generous role in allowing local actors to experiment for themselves in shaping their own practices and working toward the resolution of pressing social issues.

What questions does this approach raise? What implications does it carry with it? Looking forward, what can we say about the prospects and consequences for an approach that advocates taking First Amendment institutions seriously? Looking backward, how well does *Grutter* itself fulfill the desiderata for an institution-sensitive approach to constitutional law?

It may be too early to make too settled a pronouncement about these questions. But at least three significant points are worth making. First, as argued above, *Grutter* is not about university education alone. It speaks to the possibility of deference to a potentially wide range of other institutions that play an equally important role in the our system of public discourse: religious institutions, media institutions, libraries, perhaps professionals, arts funding authorities – and perhaps still other institutional actors.

The Court might, of course, reject those arguments out of hand. If so, it would lend further credence to the idea that *Grutter*, like *Bakke*, is nothing more than a “sport” as a First Amendment decision; “a chimera of a doctrine, affirmed only for that day, to provide an acceptable ground on which . . . [to] preserve affirmative action,” and not truly a statement of First Amendment principles after all.<sup>494</sup> But this article should make clear that, whatever the Court’s motives in arming itself with the First Amendment in *Grutter*, it is far from a mere sport. The Court has taken a broadly similar approach in recent years in examining government broadcasters, arts funders, and public libraries. It has wanted only a theory to justify its departure from settled First Amendment doctrine, the language with which to do so, and a set of rules by which to chart its course. Drawing on *Grutter*, this article has sought to provide the Court with the tools it needs.

Second, this approach is not necessarily a charter of rights for institutions – even institutions, such as the press, that manage to find special recognition in the First Amendment. Nor is it an opportunity for the Court simply to surrender

<sup>494</sup> Byrne, *supra* note \_\_\_, at 320.

its own judgment absolutely to the “complex judgments” of particular favored institutions under the First Amendment. It is, in short, neither a brief in favor of unparalleled license for First Amendment institutions, nor an argument in favor of judicial abdication in favor of these institutions. To the contrary, in some instances an institution-sensitive approach to the First Amendment may *limit* the freedom to act of First Amendment institutions. And in some cases, an institutional approach to the First Amendment may impose *greater* duties on the courts that oversee them.

As is evident in *Grutter* itself, an institution-sensitive approach to the First Amendment may favor granting greater rights to those institutions in some cases. For example, under one reading of *Grutter*, a reading that is consistent with the argument in this section, universities may be permitted greater latitude than other institutions to craft and enforce campus speech codes. In other cases, the special social obligations of a particular institution may give it *less* latitude to speak than a private individual might possess.<sup>495</sup> No one demands that the proverbial soap-box speaker limit himself to a particular subject; no one would hesitate to require a university lecturer to confine herself to the subject at hand and refrain from taking a chemistry lecture as an occasion to talk about neoliberalism. A court would hesitate long and hard before enforcing a seemingly gratuitous “contract” without clear promises or consideration on either side; but it might be more willing to find a legally enforceable contract where the agreement takes place within the journalist’s professional norm of honoring the confidentiality of sources.<sup>496</sup> In short, if the gift of taking First Amendment institutions seriously is that those institutions have substantial latitude to live by their own norms, the cost of taking them seriously is that they may be held accountable for failing to live up to their own norms.

Nor does the posture of deference I have described above utterly liberate the courts from the obligation to give cases involving First Amendment institutions serious consideration. As the democratic experimentalists have observed, liberty to experiment means little without careful monitoring. If the courts are to defer to First Amendment institutions based substantially on their compliance with their own norms, values, and practices, they will have to educate themselves far more carefully about the shifting content of those norms, values, and practices. In each case, as Schauer observes, the Court will be required to “inquire much more deeply into the specific character of the institution, and the function it serves, than it has [so far] been willing to do.”<sup>497</sup>

Looking back now at *Grutter* from that perspective, it is far from clear that the Court did a proper job of taking the First Amendment institution at issue there

<sup>495</sup> Schauer, *supra* note \_\_, at 116 n.149.

<sup>496</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

<sup>497</sup> *Id.* at 116.

– a university or a professional department within a university – seriously. Its discussion of the social role of universities, although more complete and sophisticated than much of the discussion the Court has offered in prior cases, still exists at a high level of generality. The decision contains no indication of whether universities' democratic function coexists with their truth-seeking function, or with still other social roles served by the university – and thus whether the social value of race-conscious admissions programs conflicts with the social value of any other functions served by universities. It contains no indication of whether the Court believes all higher education institutions serve or ought to serve roughly the same purposes, or whether there is room for as many conceptions of academic freedom as there are different kinds of higher educational institutions.

There are still further problems, less important for situations like *Grutter* that involve admissions decisions but with great implications for future academic freedom cases. *Grutter* contains no discussion about the norms of professional responsibility that play such a large role in discussions about the scope of *professional* academic freedom. It is difficult to defer to an educational institution on the basis that it is acting according to a legitimate academic decision without some understanding of precisely what constitutes a legitimate academic decision. What if the decision to engage in seemingly preferential admissions had been arrived at by a pure university administrator without faculty input? What if it had been imposed on the university administration by the board of governors? What if it was a result of coercion by some outside group, such as the American Association of University Professors? None of these questions are answered in the case.

Nor does *Grutter* discuss the implications of an institution-specific approach to academic freedom for other constituents in campus life – most notably, professors and students. As the discussion above indicates, that omission leaves room for a variety of potential implications for student speech, admissions policies, and other matters. What *Grutter* means for a university's freedom to shape its policies with respect to religious speech, hate speech, on-campus recruiting, and other issues has much to do not only with the university administration, but with the other stakeholders in the university. If universities are a special creature of the First Amendment, that still begs the question who gets to be counted as a member of the university community, and what it means to be a member of that community. These disputes between component parts of the university community – tenure disputes, disciplinary appeals, disputes over campus rules and regulations – are precisely the sorts of academic freedom issues that arise most often in the courts. Yet *Grutter* has nothing to say about them. Nor, given the context of the case, does it fully acknowledge that, under *professional* understandings of academic freedom, those rights carry significant

responsibilities.<sup>498</sup> Under an institution-sensitive approach to the First Amendment, a professor might, in fact, have far fewer speech rights than other citizens.<sup>499</sup>

Perhaps, then, Lani Guinier is right to see in *Grutter* the opportunity for further public discussion concerning “more foundational concerns about the democratic purpose of higher education.”<sup>500</sup> But if *Grutter* truly presages a more institution-specific approach to the First Amendment, it certainly suggests that the Court will have much more careful work to do to elaborate the nature and scope of its approach and tie that approach closely to the particular functions and norms of different institutions.

In any event, whether the Court continues to stick by its generally neutral approach to particular speakers under the First Amendment or begins to pay more careful attention to speech acts by particular institutions, *Grutter*'s significance as a First Amendment decision should be clear. If it is true that “American free speech doctrine has never been comfortable distinguishing among institutions,”<sup>501</sup> then *Grutter* represents a rare exception. Whether it will turn out to be a forerunner of similar approaches where other institutions are concerned, or simply the exception that proves the rule, remains to be seen.

One last question must be addressed. So far, I have bracketed the distinction between public universities, such as the University of Michigan and its law school, and private universities. But there is a crucial distinction between them: each lies on a different side of the public/private divide. Indeed, *Grutter* took on its constitutional character precisely because it involved a public university. It is widely recognized that, under current constitutional doctrine, private universities enjoy a far broader scope of freedom than public universities.<sup>502</sup> What role, if any, should this distinction play in taking First Amendment institutions seriously? How important is it?

For a number of reasons, I want to suggest that this distinction is less important than it may seem at first. First, the legal landscape is far less clear in

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<sup>498</sup> See, e.g., Walter P. Metzger, *Professional and Legal Limits to Academic Freedom*, 20 J. Coll. & Univ. L. 1 (1993); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265 (1988).

<sup>499</sup> See, e.g., David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 Tex. L. Rev. 1405 (1988).

<sup>500</sup> Guinier, *supra* note \_\_\_, at 120.

<sup>501</sup> *Id.* at 84.

<sup>502</sup> See, e.g., Byrne, *supra* note \_\_\_, at 299-300; see also Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 Stan. L. Rev. 1835, 1836-37 (1993); Evan G. S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 Emory L.J. 1351, 1381 (1990); Henry J. Friendly, *The Dartmouth College Case and the Public-Private Penumbra* (1969).

drawing a firm line between public and private universities than one might assume based on standard state action doctrine. This is so even if one sets aside arguments that private universities are entitled to be viewed as state actors because they fulfill a public function, receive significant public funding, or are intertwined with the affairs of the government,<sup>503</sup> and even if one ignores the web of quasi-constitutional civil rights laws and other statutory requirements that may place public and private universities under many of the same obligations.<sup>504</sup> The reason the public-private distinction may be less important in this context stems from state law, not federal state action doctrine.

State law provides two reasons why it may make less sense to treat private universities as utterly distinct from public universities in their obligations to observe norms of free speech. First, a number of courts have held that private universities must honor at least some free speech norms under *state* constitutions or statutes. Thus, in the well-known case of *State v. Schmid*,<sup>505</sup> the Pennsylvania Supreme Court reversed the conviction of a non-student for distributing leaflets without permission on the campus of Princeton University. Drawing on a then-recent Supreme Court case acknowledging that state constitutions could sweep more broadly in protecting free speech even in the absence of state action,<sup>506</sup> the court held that Pennsylvania's constitutional protection of free speech could reach "unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property."<sup>507</sup> Although this willingness on the part of state courts to reach private action under state constitutional free speech provisions is decidedly in the minority,<sup>508</sup> Pennsylvania was not alone in this approach,<sup>509</sup> and the state courts might be more willing to apply their states' constitutional free speech provisions to private colleges and universities than the shopping malls and other private actors who normally litigate these cases. Other states, building on this foundation, have thus enacted statutes attempting to guarantee that at least some of the players in the academic community enjoy free speech rights on private campuses.<sup>510</sup> Thus,

<sup>503</sup> For an examination of these arguments, see Siegel, *supra* note \_\_\_, at 1382-87.

<sup>504</sup> See, e.g., Ellen E. Lange, Note, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. Cal. L. Rev. 105 (1990).

<sup>505</sup> 423 A.2d 615 (N.J. 1980).

<sup>506</sup> See *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

<sup>507</sup> See *Schmid*, 423 A.2d at 628. For commentary, see Finkin, *supra* note \_\_\_; Comment, *Testing the Limits of Academic Freedom*, 130 U. Pa. L. Rev. 712 (1982).

<sup>508</sup> See Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims and Defenses*, § 9-3, at 9-16-9-22 (3d ed. 2000).

<sup>509</sup> See *Commonwealth v. Tate*, 432 A.2d 1382 (Pa. 1981) (applying state free speech provision to Muhlenberg College, a private institution).

<sup>510</sup> See, e.g., Cal. Educ. Code § 94367; Arthur L. Coleman and Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom From Discrimination on University Campuses*, 23 J. Coll. & Univ. L. 91, 93 n.6 (1996).

under state law, some free speech arguments may be available even on private campuses.

If that discussion suggests that *students* may not be entirely differently situated depending on whether they attend a public or private institution, what of the institutions themselves? If they are arms of the state, why should they be in the same position as public universities? Here, too, the state constitutional landscape goes some of the way toward narrowing the gap between public and private universities. Most state constitutions grant their public universities some degree of independent constitutional status.<sup>511</sup> Michigan, for example, to take an example close to the heart of *Grutter*, states in its constitution that the Board of Regents of the University of Michigan has “general supervision of the institution and the control and direction of all expenditures from the institution’s funds,”<sup>512</sup> a provision that has been read as granting the university a general right against state interference in academic affairs.<sup>513</sup> Thus, public universities are already in an odd position with respect to the state action doctrine – part of the state for some constitutional purposes, but separate from it for others.<sup>514</sup> As Peter Byrne notes, “A state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.”<sup>515</sup>

These unusual features of state law suggest that the public-private distinction is in some ways less important than outside observers might suggest. But I want to suggest two more reasons, linked less to existing law than to the potential of *Grutter*’s First Amendment, why the public-private distinction does not present a significant factor in thinking about taking First Amendment institutions seriously, at least with respect to universities. First, concerns about the public-private distinction in the university context normally concern the

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<sup>511</sup> See, e.g., Kathy L. Wyer, Comment and Note, *A Most Dangerous Experiment? University Autonomy, Academic Freedom, and the Concealed-Weapons Controversy at the University of Utah*, 2003 Utah L. Rev. 983, 1001 & nn. 88-90; John A. Beach, *The Management and Governance of Academic Institutions*, 12 J. Coll. & Univ. L. 301, 310 n.34 (1985); Joseph Beckham, *Reasonable Independence for Public Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & Educ. 177 (1978).

<sup>512</sup> Mich. Const., Art. VIII, § 5. For discussion of the effect this fact might have had on the *Grutter* litigation, see Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 St. Louis U. L.J. 889, 892-93 (2004).

<sup>513</sup> See Byrne, *supra* note \_\_\_, at 327.

<sup>514</sup> In some senses, public universities thus resemble quasi-autonomous nongovernmental institutions, or quangos. See, e.g., Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1257-64 (1999); see also Sandra van Thiel, *Quangos: Trends, Causes and Consequences* 2001); Lili Levi, *Professionalism, Oversight, and Institution-Balancing: The Supreme Court’s “Second Best” Plan for Political Debate on Television*, 18 Yale J. Reg. 315 (2001); Craig Alford Masback, *Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts*, 10 Yale L. & Pol’y Rev. 177 (1992). The implications of this similarity are discussed below, *infra* notes \_\_-\_\_ and accompanying text.

<sup>515</sup> *Id.* at 300.

opposite problem: they involve questions of whether stakeholders *within* the private university community, such as professors or students, enjoy fewer rights than do their counterparts at public universities.<sup>516</sup> Here, however, I have suggested that *Grutter's* reading of the First Amendment guarantees institutions *as a whole* a substantial right of autonomy from governmental interference. Thus, *Grutter's* First Amendment does not require us to transport First Amendment norms to the private sector, a phenomenon whose problems were so richly discussed by Julian Eule,<sup>517</sup> but to incorporate private sector norms into the First Amendment. What implications this trend might have for student and faculty rights are, as I suggested above, unclear at this point. For now, what is clear is that taking First Amendment institutions seriously demands giving public universities *more* freedom from government interference, and so brings the legal status of private and public universities closer together.

Second, as I have argued, taking First Amendment institutions seriously demands that we take them seriously *as institutions*. This point is particularly clear where the institution, like the University of Michigan Law School, is a public one, which might be judged according the standards generally applicable to other state actors or might be judged according to the purposes and norms of the particular kind of institution it happens to be.<sup>518</sup> Ultimately, it mattered less to the Supreme Court in *Grutter* that the Law School was a public institution, although that fact brought the case within the scope of the Fourteenth Amendment. The Court certainly did not treat the Law School as occupying a precisely similar position when considering affirmative action policies as any other government employer would. Rather, what mattered to the court was the *nature* of the institution. It was a *university*, engaged in legitimate academic decision-making. That fact insulated it considerably from the rigors of constitutional strict scrutiny.

This approach need not be, and is not, limited to universities alone. As we have seen, when it came time to apply standard public forum doctrine to another “government” actor – the Arkansas public broadcaster – the Court balked, preferring to focus on the institutional aspects and professional norms of the entity *qua* media organization.<sup>519</sup> Again, what mattered to the Court was the institutional status of the government entity rather than its public status.

In short, when we take First Amendment institutions seriously, it ought to make a difference whether a public institution the Law School is treated as “the government” or as “the university.” But it is also arguable that it ought to make a greater difference whether a particular institution, whether public or private, is

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<sup>516</sup> See, e.g., Olivas, *supra* note \_\_, at 1836-37.

<sup>517</sup> See Julian N. Eule and Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. Rev. 1537 (1998).

<sup>518</sup> See Schauer, *supra* note \_\_, at 116.

<sup>519</sup> See *Forbes*, 523 U.S. 666.



“the university,” or “the newspaper,” or some other category of speaker.<sup>520</sup> Regardless of their public or private status, these institutions operate “within a specialized professional culture” whose features are more salient to understanding their role and function than the source of their funds.<sup>521</sup>

It is unclear that the Court's First Amendment approach fully appreciates and incorporates these distinctions among institutions.<sup>522</sup> Yet, as cases like *Grutter*, *American Library Association*, *Forbes*, and *Finley* illustrate, neither is the Court entirely comfortable with the application of standard, one-size-fits-all First Amendment doctrine to such institutions. The institution-sensitive reading of the First Amendment I have advanced here suggests the Court's reluctance to apply standard doctrinal tests is well-founded, and that the most salient consideration should be the nature of the institution and its role in strengthening public discourse. Thus, the public-private distinction, although not irrelevant, may fade into the background in many cases. At the very least, it should be less relevant in cases involving conflicts between the institution (whether public or private) and the state, although its relevance for cases involving intramural disputes is still uncertain.<sup>523</sup>

## V. CONCLUSION

As I said at the outset of this paper, there will be more than enough discussion of the important Fourteenth Amendment implications of *Grutter*. This paper has suggested that something more is needed. Serious attention must be paid to the *First* Amendment implications of *Grutter*.

This paper has offered three potential readings of *Grutter*'s First Amendment implications. First, the case may be read simply as counseling a broad degree of deference to academic decisions made by *educational* institutions. This reading says little about the implications of the case beyond that narrow set of circumstances. Even within this confined field, however, I have

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<sup>520</sup> See Philip Selznick, 'Law in Context' Revisited, 30 J. L. & Soc'y 177, 181-82 (2003) (arguing, in context of discussion of academic freedom, that law ought to recognize the “requirements and dynamics” of particular social institutions).

<sup>521</sup> Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 Hastings Comm. & Ent. L.J. 275, 377 (1998); see also Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1477 (2001); Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151 (1996); Tushnet, *supra* note \_\_, at 1257-64; Cole, *supra* note \_\_.

<sup>522</sup> See Post, *supra* note \_\_, at 1272, 1273 (“[A]ll legal values are rooted in the experiences associated with local and specific kinds of social practices. because law is ultimately a form of governance, it does not deal with values as merely abstract ideas or principles. . . . The most general objection to any single free speech principle is that speech makes possible a world of complex and diverse social practices precisely because it becomes integrated into and constitutive of these different practices; it therefore assumes the diverse constitutional values of these distinct practices.”).

<sup>523</sup> See generally Finkin, *supra* note \_\_.

suggested that an institutional autonomy approach to academic freedom could question or upset a number of settled First Amendment doctrines, and point toward surprising results in a number of cases in the future. Second, *Grutter* might be read as advancing a particular *substantive* vision of education as a democratic good, and perhaps by extension a particular substantive vision of the First Amendment as a whole. This reading is fraught with even greater problems. It sits uneasily with the Court's approach elsewhere in the First Amendment jurisprudence, and fails to acknowledge the difficulty in enshrining in the First Amendment any particular vision of education or academic freedom when those values are deeply contested outside the courts, in the very communities to whom the Court was ready to defer.

Finally, and most intriguingly, *Grutter's* First Amendment can be read as a First Amendment that finally and fully takes First Amendment institutions seriously. This reading counsels a particular sort of deference to a wider range of institutions than merely universities alone. It suggests that the Court ought to recognize the unique social role played by a variety of institutions whose contributions to public discourse play a fundamental role in our system of free speech. Equally, it suggests that the Court ought to attend to the unique social *practices* of these institutions, allowing the scope of its deference to be guided over time by the changing norms and values of those institutions. In this way, taking First Amendment institutions seriously may be one method of recognizing and incorporating into First Amendment jurisprudence a concern for the varied and particular social domains in which speech occurs. Just as important, this approach acknowledges that constitutional law is not the sole preserve of the courts. It is a shared activity, in which legal and nonlegal institutions alike are engaged in a cooperative attempt to build a constitutional culture that is responsive to the real world of free speech.

Whether *Grutter's* discussion of the First Amendment proves to be long-lasting, or merely a ticket good for one day and one trip only, these readings of *Grutter's* First Amendment demonstrate that it richly deserves to be read and considered for all it is worth. It deserves to be treated as an invitation to ponder a First Amendment that gives full consideration to the unique role played by various First Amendment institutions – universities, libraries, private associations, the media, religious groups – and allows them to flourish and develop their own norms and rules without fitting within a preconceived, generally applicable, sometimes Procrustean legal framework. And it deserves consideration because it begs the question of the limits and implications of that approach.

I close with a simple plea. *Grutter* will obviously have its day under the microscope of the Fourteenth Amendment scholars. It would be a great shame, however, if First Amendment scholars, casebook editors, treatise writers, and other gatekeepers of the First Amendment canon give *Grutter* the same treatment

they have accorded *Bakke* and relegate it to the footnotes, or ignore it altogether. *Grutter* has not yet earned its place in the First Amendment canon, but it is surely knocking at the door.